



January 2014

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### Recommended Citation

William L. Saunders Jr. & A. R. Franzonello, *Health Care Reform and Respect for Human Life: How the Process Failed*, 25 NOTRE DAME J.L. ETHICS & PUB. POL'Y 593 (2012).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol25/iss2/18>

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## HEALTH CARE REFORM AND RESPECT FOR HUMAN LIFE: HOW THE PROCESS FAILED

WILLIAM L. SAUNDERS, JR.\* & ANNA R. FRANZONELLO†

### INTRODUCTION

On March 24, 2010, behind closed doors, without reporters, President Barack Obama signed an executive order, “Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act” (hereafter “the Executive Order” or “the Order”).<sup>1</sup> The Order, as its title suggests, purported to restrict the abortion funding in the Patient Protection and Affordable Care Act (PPACA),<sup>2</sup> an historic piece of legislation the President signed into law just one day earlier with much mass-media presence and attention.<sup>3</sup> Whether the Executive Order would—or even could—achieve its espoused goal is a central question examined by this Article.

In 2009 Democrats controlled both chambers of Congress by wide margins.<sup>4</sup> In fact, they had a “filibuster-proof” majority in the Senate: that is, with a three-fifths majority, the Democrats could prevent Republicans from taking advantage of the rules that generally allow a senator to speak for as long as he or she

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1. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010). *See also* Jake Tapper & Huma Khan, *Obama Signs Executive Order on Abortion Today*, ABC GOOD MORNING AM. (Mar. 24, 2010), <http://abcnews.go.com/GMA/Health-Care/health-care-obama-sign-executive-order-abortion-today/story?id=10187434>.

2. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.) [hereinafter PPACA]. For ease of reference, PPACA as used here also includes amendments made to it by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

3. Huma Khan, *Obama Signs Health Care Bill Today as GOP Challenges Constitutionality*, ABC GOOD MORNING AM. (Mar. 23, 2010), <http://abcnews.go.com/GMA/HealthCare/obama-sign-health-care-bill-law-republicans-challenge/story?id=10176898>.

4. In the 111th Congress, Second Session, the House had 256 Democrats, 178 Republicans, and 1 vacancy; the Senate had 57 Democrats, 41 Republicans, and 2 Independents who caucused with the Democrats. *See* JENNIFER E. MANNING, CONG. RESEARCH SERV., MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE (2010), [http://assets.opencrs.com/rpts/R40086\\_20100204.pdf](http://assets.opencrs.com/rpts/R40086_20100204.pdf).

wishes (and thus obstruct, or “filibuster,” a bill from moving forward) by invoking “cloture,” which limits debate.<sup>5</sup> Energized by the historic election of Democrat President Obama, who campaigned on a promise of “hope” and “change,” Congress aggressively took on the agenda of the White House and set out to “reform” health care, a long desired goal of the party. In total, the Democrats produced five health care reform bills.

The PPACA was the last of these bills to materialize. It was introduced in the Senate by Majority Leader Harry Reid on November 19, 2009 as H.R. 3590.<sup>6</sup> This paper will focus in large part on PPACA, or “the final Senate bill,” as it is now the law. However, to explain how the health care reform process failed to respect human life, some attention must be given to the bills that preceded it—both their language and how they were negotiated.

The Senate produced two other bills before the PPACA. The Senate Health, Education, Labor and Pensions (HELP) Committee had approved a bill sponsored by Senator Tom Harkin (D-Iowa), S. 1679, the Affordable Health Choices Act (the Senate HELP bill).<sup>7</sup> The Senate Finance Committee bill, S. 1796, America’s Healthy Future Act (the Baucus bill), was offered by Senator Max Baucus (D-Mont.) on September 16, 2009.<sup>8</sup>

In addition, two bills originated in the House of Representatives. The first, H.R. 3200, America’s Affordable Health Choices Act, was reported out by the three House committees responsible for its proposal—House Energy and Commerce, Ways and Means, and Education and Labor.<sup>9</sup> The second, H.R. 3962, the Affordable Health Care for America Act, was introduced on

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5. Forty-one votes are necessary to defeat cloture. Thus, when Al Franken was declared the winner of the Minnesota election, he gave the Democrats the sixty votes needed to deny Republican filibuster. *Al Franken Declared Winner of Minnesota Senate Race, Giving Democrats Filibuster-Proof Majority*, N.Y. DAILY NEWS, June 30, 2009, [http://www.nydailynews.com/news/politics/2009/06/30/2009-06-30\\_minnesota\\_supreme\\_court\\_.html](http://www.nydailynews.com/news/politics/2009/06/30/2009-06-30_minnesota_supreme_court_.html).

6. Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2009) (enacted).

7. Affordable Health Choices Act, S. 1679, 111th Cong. (2009). The Senate HELP bill was often referred to as the “Kennedy Bill” because the late Senator Ted Kennedy (D-Mass.) was the chair of the HELP committee and played an instrumental role in its drafting. See Ryan Grim, *Kennedy Health Care Reform Bill Released—Help us read Through It*, HUFFINGTON POST (June 9, 2009, 8:25 PM), [http://www.huffingtonpost.com/2009/06/09/kennedy-health-care-reform\\_n\\_213509.html](http://www.huffingtonpost.com/2009/06/09/kennedy-health-care-reform_n_213509.html).

8. America’s Healthy Future Act, S. 1796, 111th Cong. (2009).

9. America’s Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009).

October 29, 2009 and was passed by the House on November 7, 2009.<sup>10</sup>

Throughout the debate over these bills, abortion funding was a sticking point for Congressmen on both sides of the issue. This Article will explain the abortion-funding aspects of these health care reform bills. First, however, the Article will recount the promises President Obama has made regarding his vision for health care reform and abortion funding. In Part II, the Article will explain the Hyde Amendment (a federal restriction on abortion funding)<sup>11</sup> and explore its relationship to the health care reform bills. In Part III, the Article will detail the abortion-funding provisions of the health care reform bills. This section will document attempts to add Hyde-like language to the bills and other “compromises” that were either proposed and failed or adopted. In Part IV, the Article will explain the process in which the Senate bill became the law. In Part V, other anti-life provisions of PPACA will be discussed. Finally, in Part VI, the Article will examine abortion funding in health care law today and identify federal and state responses.

### I. THE PRESIDENT’S PROMISE(S)

Many will remember the August recess of 2009 in which Congressmen returned to their home states for what became rather animated town-hall meetings.<sup>12</sup> Health care reform was a hot button issue at these meetings. America’s Affordable Health Choices Act and the Senate HELP bill had been reported by their committees, and the reaction of many citizens to the sweeping reform of these massive bills was negative on multiple counts. One concern was that both bills, in opposition to longstanding federal law and policy, authorized the use of federal funds for elective abortion.<sup>13</sup>

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10. Affordable Health Care for America Act, H.R. 3962, 111th Cong. (2009).

11. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2009, Pub. L. No. 111-8, § 507(a), 123 Stat. 524, 802. The Hyde Amendment was originally enacted in 1976. Departments of Labor and Health, Education, and Welfare Appropriation Act of 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) [hereinafter Hyde Amendment].

12. See, e.g., Kristi Keck, *Fears Fuel Emotional Health Care Protests*, CNN (Sept. 2, 2009), <http://www.cnn.com/2009/POLITICS/08/12/health.care.fears/index.html?iref=allsearch>; *On the Record with Greta Van Susteren: Protesters Sound Off on ‘Un-American’ Town Hall Rage* (Fox News television broadcast Aug. 11, 2009).

13. See, e.g., HighCampMedia, *Joe Barton—Obama Healthcare will Pay for Abortions—Townhall Meeting*, YouTube (Aug. 19, 2009), <http://www.youtube.com/watch?v=...>

In response, on September 9, 2009, President Obama addressed a joint session of Congress to outline his vision for a health care bill, and to clear up any “misunderstandings” about the current proposals.<sup>14</sup> Of particular note for this Article, the President asserted, “And one more misunderstanding I want to clear up—under our plan, no federal dollars will be used to fund abortions, and federal conscience laws will remain in place.”<sup>15</sup>

After the President’s speech to Congress, Health and Human Services (HHS) Secretary Kathleen Sebelius was asked on ABC’s *This Week* about the President’s statement regarding abortion funding. Host George Stephanopoulos asked, “So you’re saying [the President] will go beyond what we have seen so far in the House and explicitly rule out any public funding for abortion?” Sebelius responded, “Well, that’s exactly what the President said and that’s what he intends that the bill he signs will do.”<sup>16</sup>

However, doing so would have contradicted a prior promise made by the President. At a Planned Parenthood Action Fund event in July 2007, then-candidate Obama stated, “[I]n my mind, reproductive care is essential care, basic care, so it is at the center, the heart of the [health care] plan that I [will] propose.”<sup>17</sup> Obama elaborated on the details of his plan: “[W]hat we are doing is to say that we’re going to set up a public plan that all persons and all women can access if they don’t have health insurance. It’ll be a plan that will provide all essential services, including reproductive services.”<sup>18</sup> Obama also stated that under his plan “insurers are going to have to abide by the same rules in

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com/watch?v=K\_jD2edn9mc&feature=player\_embedded (showing discussion between Rep. Joe Barton (R-Tex.) and concerned constituents at a town hall meeting in Mansfield, Texas, on August 19, 2009); see also IssuesAndJustice, *Dem Congresswomen: ObamaCare = Abortion Funded by Taxes*, YouTube (Aug. 11, 2009), <http://www.youtube.com/watch?v=RTYvK4h44RU> (showing discussion between Rep. Zoe Lofgren (D-Cal.) and concerned constituents at a town hall meeting in San Jose, California, on August 10, 2009).

14. President Barack Obama, Remarks to a Joint Session of Congress on Health Care (Sept. 9, 2009), available at [www.whitehouse.gov/the\\_press\\_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/](http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-to-a-Joint-Session-of-Congress-on-Health-Care/).

15. *Id.*

16. *This Week: President Rules Out Public Funding for Abortion* (ABC television broadcast Sept. 13, 2009), available at <http://abcnews.go.com/video/playerIndex?id=8561166>. See also Dan Gilgoff, *Did Sebelius Back More Steps for Banning Abortion Funding in Healthcare?*, U.S. NEWS & WORLD REP. (Sept. 14, 2009), [www.usnews.com/blogs/god-and-country/2009/09/14/did-sebelius-back-more-steps-for-banning-abortion-funding-in-healthcare.html](http://www.usnews.com/blogs/god-and-country/2009/09/14/did-sebelius-back-more-steps-for-banning-abortion-funding-in-healthcare.html).

17. Senator Barack Obama, Address to Planned Parenthood Action Fund (July 17, 2007), available at [http://lauraechevarria.com/?page\\_id=14](http://lauraechevarria.com/?page_id=14).

18. *Id.*

terms of providing comprehensive care, including reproductive care . . . . [T]hat's going to be absolutely vital."<sup>19</sup> The next day, the *Chicago Tribune* reported that an Obama spokesman confirmed that "reproductive health services" included abortion.<sup>20</sup> This was reinforced by President Obama's Secretary of State, Hillary Clinton, who testified before the House Foreign Affairs Committee on April 22, 2009 that "reproductive health includes access to abortion . . . . [W]e are now an Administration that will protect the rights of women, including their rights to reproductive health care."<sup>21</sup>

Furthermore, the Democratic Party Platform of 2008, on which President Obama ran for office, states that "[t]he Democratic Party strongly and unequivocally supports *Roe v. Wade* and a woman's right to choose a safe and legal abortion, regardless of her ability to pay . . . ."<sup>22</sup> To explicitly rule out any public funding of abortion, as Sebelius claimed the President was now prepared to do, would be in direct opposition to this platform plank.

Seeking clarification, Americans United for Life (AUL) Action staffers met with senior White House officials Melody Barnes (Director of the Domestic Policy Council), Tina Tchen (Director of the Office of Public Engagement and Executive Director of the Council on Women and Girls), and Joshua DuBois (Director of the White House Office of Faith-Based and Neighborhood Partnerships) on September 17, 2009. AUL Action's president, Dr. Charmaine Yoest, reported afterwards that the White House staff "reiterated the President's statement about opposing abortion funding," but "would not commit to language that explicitly excludes abortion from health care reform."<sup>23</sup>

Less than three weeks prior to his address to Congress, at the Organizing for America National Health Care Forum, Presi-

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19. *Id.*

20. Mike Dorning, *Democrats Pledge Support for Wide Access to Abortion*, CHI. TRIB., Jul. 18, 2007, at C7.

21. *New Beginnings: Foreign Policy Priorities in the Obama Administration: Hearing Before the H. Comm. on Foreign Affairs*, 111th Cong. 24 (2009) (testimony of Hillary Rodham Clinton, Secretary of State of the United States), available at <http://foreignaffairs.house.gov/111/48841.pdf>.

22. DEMOCRATIC NAT'L CONVENTION COMM., THE 2008 DEMOCRATIC NATIONAL PLATFORM: RENEWING AMERICA'S PROMISE 50 (2008), available at [http://www.democrats.org/about/party\\_platform](http://www.democrats.org/about/party_platform).

23. *After White House Meeting, Pro-Life Leader Remains 'Deeply Concerned' About Abortion in Health Care Reform*, AMS. UNITED FOR LIFE (Sept. 19, 2009), <http://www.aul.org/2009/09/september-18-after-white-house-meeting-pro-life-leader-remains-%E2%80%98deeply-concerned%E2%80%99-about-abortion-in-health-care-reform/>.

dent Obama attempted to assuage pro-life constituents by stating, "There are no plans under health reform to revoke the existing prohibition on using federal taxpayer dollars for abortions. Nobody is talking about changing that existing provision, the Hyde Amendment. Let's be clear about that. It's just not true."<sup>24</sup> Members of Congress also repeated the claim that the Hyde Amendment barred abortion funding because it was "settled" law.<sup>25</sup>

However, there was no need to "change" or repeal the Hyde Amendment in order to fund abortion with federal dollars through health care reform. As will be discussed in the next Section, the Hyde Amendment did not apply to the health care reform bills; it applied only to funding pursuant to the Labor Health and Human Services (LHHS) appropriations bill. Whether the Hyde Amendment was being "attacked" was irrelevant to whether abortion could be funded with federal funds appropriated through health care reform. (However, as will be discussed later in this Article, the bills in existence at the time of the President's speech contained a trigger that would mandate, not simply permit, abortion funding should the Hyde Amendment be repealed. The so-called "compromise" of the PPACA is similarly tied to the Hyde Amendment's continued existence.)

In August 2009, even members of the mainstream media were willing to acknowledge that the health care reform bills bypassed the Hyde Amendment, and that, without a statutory prohibition within the law itself, abortion would be federally funded.<sup>26</sup> It is difficult to believe Democratic leadership did not

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24. President Barack Obama, Remarks to the Organizing for America National Health Care Forum (Aug. 20, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-organizing-america-national-health-care-forum>.

25. Senator Richard Durbin (D-Ill.) claimed that the Hyde Amendment was "basically settled law." *Hardball with Chris Matthews* (MSNBC television broadcast July 13, 2009). However, despite what certain Democratic members of Congress, including Senator Durbin, claim, the Hyde Amendment is not settled law, but must be introduced and approved each year.

26. See Ricardo Alonso-Zaldivar, *Govment Insurance Would Allow Coverage for Abortion*, BREITBART (Aug. 5, 2009), <http://www.breitbart.com/article.php?id=D99SLQBG0> ("A law called the Hyde Amendment applies the restrictions to Medicaid, forcing states that cover abortion for low-income women to do so with their own money. Separate laws apply the restrictions to the federal employee health plan and military and other programs. But the health overhaul would create a stream of federal funding not covered by the restrictions."); Michael Scherer, *How Abortion Could Imperil Health-Care Reform*, TIME (Aug. 24, 2009), [www.time.com/time/politics/article/0,8599,1918261,00.html?xid=rss-politics-cnn](http://www.time.com/time/politics/article/0,8599,1918261,00.html?xid=rss-politics-cnn) ("The health-care-reform bill proposed by House Democrats does not actually override [federal abortion funding] restrictions. But it does find a

know this. Constant references to “Hyde” may have been intended to mislead the American public, who opposed government funding of abortion by significant numbers.<sup>27</sup>

## II. THE HYDE AMENDMENT AND HEALTH CARE REFORM

Named after its original author, Representative Henry Hyde,<sup>28</sup> the Hyde Amendment enacts a broad prohibition on the use of federal funds appropriated through the LHHS appropriations. The text states that “[n]one of the funds . . . shall be expended for any abortion,”<sup>29</sup> and that “[n]one of the funds . . . shall be expended for health benefits coverage that includes coverage of abortion.”<sup>30</sup> Thus, the Hyde Amendment prohibits “direct” and “indirect” abortion funding.

The Hyde Amendment is not permanent law. A rider, not a statute, the Hyde Amendment requires Congressional approval each year. Congress has approved this funding restriction, either by an amendment to the annual LHHS appropriations bill or by a joint resolution, every year since September 1976.<sup>31</sup>

The Hyde Amendment restricts abortion funding in Medicaid, the health care program for low income Americans that was established in 1965.<sup>32</sup> Though Medicaid is managed by individ-

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way for the Federal Government to expand the coverage of abortion services through a government-run program—the so-called public option—without spending what it defines as federal dollars on abortion.”).

27. *Poll: Majority Favor Abortion Funding Ban*, CNN (Nov. 18, 2009), [http://articles.cnn.com/2009-11-18/politics/abortion.poll\\_1\\_public-option-abortion-issue-health-insurance?\\_s=PM:POLITICS](http://articles.cnn.com/2009-11-18/politics/abortion.poll_1_public-option-abortion-issue-health-insurance?_s=PM:POLITICS) (stating that in 2009, six out of ten Americans favored a ban on federal funding for abortions).

28. Henry Hyde (R-Ill.) was a member of the House of Representatives from 1975 to 2007, representing the Sixth District of Illinois. Rep. Hyde chaired the Judiciary Committee from 1995 to 2001 and the House International Relations Committee from 2001 to 2007. *Hyde, Henry John*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=H001022> (last visited Apr. 22, 2011).

29. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2009, Pub. L. No. 111-8, § 507(b), 123 Stat. 524, 802.

30. *Id.* § 507(c), 123 Stat. at 802.

31. However, the exceptions permitted by the Hyde Amendment have varied. *See infra* note 35.

32. Medicaid Act, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended at 42 U.S.C. §§ 1396–1396w-2). The Medicaid program was created in 1965, when Congress added Title XIX to the Social Security Act for the purpose of providing federal financial assistance to states that choose to reimburse certain costs of medical treatment for needy persons. 42 U.S.C. § 1396-1 (2006). Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIX. § 1396a.



ual states, the program is funded, in part, with federal dollars which are allocated through the LHHS appropriations bill.<sup>33</sup> Currently, the Hyde Amendment forbids states from using these federal funds for abortions except in cases of rape or incest or when the mother's life is endangered.<sup>34</sup> In the past, Congress has broadened or narrowed the categories where reimbursement is allowed.<sup>35</sup> Congress can similarly expand or narrow the exceptions or simply drop the amendment entirely in the future. Thus, while the Hyde Amendment is a longstanding federal law—approved by Congress thirty-four years in a row—it is susceptible to change and even complete eradication on a yearly basis.

Though the Hyde Amendment is vulnerable to political pressure, its constitutionality is clear. In 1980, the Supreme Court upheld the constitutionality of the Hyde Amendment in the case of *Harris v. McRae*.<sup>36</sup> The Court rejected claims that restricting abortion funding was invalid as a denial of due process, equal protection, freedom of religion, or as an establishment of religion in violation of the First Amendment.<sup>37</sup> The Court found that the funding restriction of the Hyde Amendment “places no governmental obstacle in the path of a woman

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33. See Notice Medical Assistance Percentages for Fiscal Year 2010, 73 Fed. Reg. 72,051–53 (Oct. 30, 2008).

34. It also requires that states cover abortions that meet the federal exceptions. See GUTTMACHER INST., STATE POLICIES IN BRIEF: STATE FUNDING OF ABORTION UNDER MEDICAID AS OF NOVEMBER 1, 2010 (2010), [http://www.guttmacher.org/statecenter/spibs/spib\\_SFAM.pdf](http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf) (detailing current state funding of abortion).

35. The Hyde Amendment applicable for fiscal year 1980 provided that “[None] of the Federal funds provided by this joint resolution . . . shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service.” Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979). The 1980 version of the Hyde Amendment was broader than that applicable for fiscal year 1977, which did not include the “rape or incest” exception. See Pub. L. No. 96-86, § 118, 93 Stat. 656, 663 (1979); Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). The 1980 version of the Hyde Amendment was narrower than that applicable for most of fiscal year 1978, and all of fiscal year 1979, which had an additional exception for “instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.” Pub. L. No. 95-480, § 210, 92 Stat. 1567, 1586 (1978).

36. 448 U.S. 297 (1980).

37. *Id.* at 310. The Court also found that the Social Security Act does not require states participating in the Medicaid program to fund “medically necessary” abortions for which there is no federal reimbursement under the Hyde Amendment. *Id.*

who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.”<sup>38</sup>

Though it was existing law during the health care debate, the Hyde Amendment has a limited application. A rider to the LHHS appropriations bill, the Hyde Amendment directs that, “None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act” may be used for abortion or insurance plans that cover abortion. Thus, if a program’s funding does not pass through the LHHS appropriations process, the Hyde Amendment does not apply.

The funding streams created by the PPACA in fact do not pass through the LHHS appropriations process. (All the health care reform bills preceding PPACA also self-appropriated their funding and thus would have similarly bypassed the Hyde Amendment.)<sup>39</sup> Therefore, to ensure that federal funds would not be used for abortion, an explicit prohibition (like the Hyde Amendment) would be necessary. Consider what originally happened with Medicaid: the legislation creating Medicaid did not mention abortion as a covered service. However, federal dollars were paying for abortion before the enactment of the Hyde Amendment.<sup>40</sup> Federal courts have since held that without the explicit prohibition of abortion funding by the Hyde Amendment, abortion would fall within “many of the mandatory care categories including family planning, outpatient services, inpatient services and physician services.”<sup>41</sup> These court decisions

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38. *Id.* at 315.

39. See Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 307(c)(2) (2009) (creating the Health Insurance Exchange Trust Fund (the “Trust Fund”) to fund new health care spending and entitlements); America’s Healthy Future Act, S. 1796, 111th Cong. (2009) (establishing a funding mechanism that mirrors that of the PPACA); Affordable Health Choices Act, S. 1679, 111th Cong. § 3101 (2009) (self-appropriating its funding); America’s Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. § 207(c)(2) (2009) (establishing a “Trust Fund” as well).

40. Medicaid funded around 300,000 elective abortions per year before the enactment of the Hyde Amendment. Since then, states have taken various approaches on abortion funding. A Guttmacher Institute literature review released in 2009 shows strong consensus that abortion rates are reduced when public funding is restricted. The review cites twenty academic studies documenting this relationship and only four that found the results of public-funding inconclusive. STANLEY K. HENSHAW ET AL., GUTTMACHER INSTITUTE, RESTRICTIONS ON MEDICAID FUNDING FOR ABORTIONS: A LITERATURE REVIEW 3–4 (2009), <http://www.guttmacher.org/pubs/MedicaidLitReview.pdf>.

41. *Planned Parenthood v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996). See also *Hope Med. Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995);

mean that without explicit language prohibiting abortion funding, mandatory abortion funding will be read into health care legislation.

At the time of the health care reform debate, no government health plans covered elective abortion, including Medicaid, the Federal Employees Health Benefits Program, the State Children's Health Insurance Program, and other programs.<sup>42</sup> The "status quo" prior to the PPACA was that federal tax dollars are not used to pay for abortion nor for insurance plans that cover abortions.

### III. ABORTION FUNDING PROVISIONS OF THE HEALTH CARE REFORM BILLS

#### A. *Early Efforts to Include Hyde-like Language and False "Compromises"*

Prior to the President's address to Congress on September 9, 2009 (in which he announced that "no federal dollars will be used to fund abortions"), proposed amendments that would have explicitly prohibited abortion funding in the two bills that had already been approved by Congressional committees, H.R. 3200 and the Senate HELP bill, were defeated. Instead, the bills had adopted language explicitly permitting, if not mandating, abortion funding.

For example, on July 30, 2009, an amendment to the House bill, offered in the House Energy and Commerce Committee by Reps. Bart Stupak (D-Mich.) and Joe Pitts (R-Pa.), would have codified the Hyde Amendment principles.<sup>43</sup> The bipartisan

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Little Rock Family Planning Services v. Dalton, 60 F.3d 497 (8th Cir. 1995); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995).

42. See Omnibus Appropriations Act of 2009, Pub. L. No. 111-153, §§ 613-14, 123 Stat. 524, 676-77. In the Federal Employees Health Benefits (FEHB) Program, the government contributes to premiums of federal employees in order to allow them to purchase private health insurance. See *Federal Employees Health Benefits Program*, U.S. OFFICE OF PERS. MGMT., <http://www.opm.gov/insure/health/> (last visited Apr. 22, 2011). The Financial Services and General Government Appropriations bill that provides funding for the FEHB program has annually prohibited these government contributions from being used towards insurance plans that cover abortion since 1983 (with the exception of 1993-1995). NARAL PRO-CHOICE AM., ABORTION COVERAGE FOR WOMEN ENROLLED IN FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM (2011), <http://www.prochoiceamerica.org/media/fact-sheets/abortion-coverage-federal-employees.pdf>.

43. H. COMM. ON ENERGY & COMMERCE, 111TH CONG., AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3200 (2009), available at [http://democrats.energycommerce.house.gov/Press\\_111/20090730/hr3200\\_pitts\\_1.pdf](http://democrats.energycommerce.house.gov/Press_111/20090730/hr3200_pitts_1.pdf) (Amendment proposed by Rep. Stupak & Rep. Pitts.); H. COMM.

“Stupak-Pitts amendment” initially passed in committee on a vote of thirty-one to twenty-seven.<sup>44</sup> However, that included a last-minute switch from “no” to “yes” by staunchly pro-abortion committee Chairman Henry Waxman (D-Cal.).<sup>45</sup> By voting with the prevailing party, the procedural rules allowed Chairman Waxman to request another vote to reconsider the amendment.<sup>46</sup>

Within hours, Chairman Waxman made a motion to reconsider the amendment.<sup>47</sup> The motion was approved thirty-five to twenty-four.<sup>48</sup> (Rep. Stupak was the only Democrat on the committee to vote against the motion.) When the amendment was reconsidered, it failed by one vote—twenty-nine to thirty.<sup>49</sup>

The Committee instead accepted an amendment proposed by pro-abortion Representative Lois Capps (D-Cal.).<sup>50</sup> Under the

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ON ENERGY & COMMERCE, 111TH CONG., ROLL CALL VOTE TO AMENDMENT BY REP. STUPAK (2009), available at [http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/071709\\_Health\\_Reform/StupakPitts.pdf](http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/071709_Health_Reform/StupakPitts.pdf) (amendment defeated on July 31, 2009 by a vote of twenty-seven to thirty-one).

44. H. COMM. ON ENERGY AND COMMERCE, 111TH CONG., ROLL CALL VOTE TO AMENDMENT BY REP. PITTS—ABORTION (2009), available at [http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/071709\\_Health\\_Reform/pitts1\\_001\\_xml.pdf](http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/071709_Health_Reform/pitts1_001_xml.pdf).

45. See John McCormack, *Waxman Strong-arms Vote to Allow Abortion Coverage in Public Plan*, WEEKLY STANDARD (July 31, 2009, 12:35 PM), [http://www.weeklystandard.com/weblogs/TWSFP/2009/07/house\\_democrat\\_introduces\\_comp.asp](http://www.weeklystandard.com/weblogs/TWSFP/2009/07/house_democrat_introduces_comp.asp). Rep. Waxman is officially endorsed by Planned Parenthood. 2010 Endorsements, PLANNED PARENTHOOD ACTION CTR., <http://www.plannedparenthoodaction.org/elections-politics/voter-guide-endorsements-797.htm#California> (last visited Nov. 15, 2010). Planned Parenthood has rated his voting record at 100% with them. 2010 Scorecard and Voter Guide, PLANNED PARENTHOOD ACTION CTR., <http://www.plannedparenthoodaction.org/elections-politics/2010-elections-map.htm#/California> (last visited Nov. 15, 2010).

46. HENRY M. ROBERT, ROBERT'S RULES OF ORDER art. V, §33 (1915), available at <http://www.robertsrules.org/rtror-05.htm#33>.

47. Jay Sekulow, *The Facts About Abortion & Health Care*, AM. CTR. FOR LAW & JUSTICE (Aug. 4, 2009, 4:35 PM), <http://www.aclj.org/TrialNotebook/Read.aspx?id=827>. The original vote was taken in the House Energy and Commerce Committee on Thursday, July 30, 2009 at 9:34 p.m. Chairman Waxman called for a vote to reconsider the amendment at approximately 11:20 p.m. that evening. *Id.*

48. H. COMM. ON ENERGY & COMMERCE, 111TH CONG., ROLL CALL VOTE TO RECONSIDER PITTS AMENDMENT 1-001 (2009), available at [http://www.aclj.org/media/pdf/hr3200\\_pitts\\_1\\_reconsider-080409.pdf](http://www.aclj.org/media/pdf/hr3200_pitts_1_reconsider-080409.pdf).

49. H. COMM. ON ENERGY & COMMERCE, 111TH CONG., ROLL CALL VOTE TO AMENDMENT BY REP. PITTS (2009), available at [http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/071709\\_Health\\_Reform/Waxmanrevote.pdf](http://republicans.energycommerce.house.gov/Media/file/Markups/FullCmte/071709_Health_Reform/Waxmanrevote.pdf).

50. H. COMM. ON ENERGY & COMMERCE, 111TH CONG., AMENDMENT TO THE AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 3200 (2009), available at [http://Republicans.EnergyCommerce.house.gov/Media/file/Markups/FullCmte/071709\\_Health\\_Reform/Capps.pdf](http://Republicans.EnergyCommerce.house.gov/Media/file/Markups/FullCmte/071709_Health_Reform/Capps.pdf) [hereinafter CAPPs]. Rep. Capps has

Capps Amendment, private plans would not have been forced to provide abortion coverage.<sup>51</sup> However, the Capps Amendment was explicit that it would allow the Secretary of HHS to include abortion as a mandatory minimum benefit in the new public health care plan, regardless of the Hyde Amendment.<sup>52</sup> Kathleen Sebelius, the current Secretary of HHS, whose pro-abortion track record has earned praise from abortion advocacy groups,<sup>53</sup> would make that determination. The Capps Amendment also permitted "affordability credits" to be used for private health care plans that cover abortion.<sup>54</sup> (The mechanics of the Capps

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also been endorsed by Planned Parenthood. 2010 Endorsements, *supra* note 45 (Planned Parenthood endorses Rep. Capps and rates her voting record at 100%).

51. CAPPS, *supra* note 50, § 122(d)(1).

52. *Id.* § 122(d)(2).

53. As Governor of Kansas, Kathleen Sebelius vetoed abortion legislation in Kansas in 2003, 2005, 2006, and 2008. *Kathleen Sebelius on Abortion*, ON ISSUES, [http://www.ontheissues.org/governor/Kathleen\\_Sebelius\\_Abortion.htm](http://www.ontheissues.org/governor/Kathleen_Sebelius_Abortion.htm) (last updated Aug. 12, 2009). In her 2008 veto statement, Sebelius said, "Nothing is more important to me than the safety, health, and *privacy* rights of our citizens." 2008 Annual Report: *Kansas: Rescuing Rights to Medical Privacy*, CTR FOR REPROD. RIGHTS, <http://reproductiverights.org/en/feature/2008-annual-report-seizing-today-transforming-tomorrow> (last visited Sept. 28, 2010) (emphasis added). Sebelius' confirmation marked the first of three Obama nominees that NARAL Pro-Choice America worked to confirm as part of its *Three-for-Three* campaign. Press Release, NARAL Pro-Choice Am., NARAL Pro-Choice America to Launch Three-for-Three Campaign to Confirm Key Obama Nominees (Apr. 1, 2009), available at [http://www.prochoiceamerica.org/media/press-releases/2009/pr04012009\\_threeforthree.html](http://www.prochoiceamerica.org/media/press-releases/2009/pr04012009_threeforthree.html). Kathleen Sebelius has been endorsed by Planned Parenthood and they have conducted fundraising activity on her behalf. On her confirmation to HHS, Planned Parenthood wrote: "We applaud Gov. Kathleen Sebelius' confirmation as secretary of health and human services." Press Release, Planned Parenthood, PPFA Statement on Gov. Kathleen Sebelius' Confirmation as Secretary of HHS (Apr. 28, 2009), available at <http://www.plannedparenthood.org/about-us/newsroom/press-releases/ppfa-statement-gov-kathleen-sebelius-confirmation-secretary-hhs-26746.htm>. Emily's List, an organization whose sole purpose is to elect pro-abortion women, was "pleased to congratulate Governor Kathleen Sebelius on her nomination as the next Secretary of Health and Human Services." Press Release, Emily's List, Statement from Ellen R. Malcolm on the Nomination of Gov. Kathleen Sebelius for Secretary of Health and Human Services (Mar. 2, 2009), available at [http://emilyslist.org/news/releases/sebelius\\_nomination](http://emilyslist.org/news/releases/sebelius_nomination).

54. America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. §§ 241–45 (2009). Affordability credits are subsidies offered to individuals earning between 133% to 400% of the federal poverty level that are to be put towards the purchase of health insurance. Individuals could use the subsidies to offset the cost of enrolling in either the public plan that the bills envisioned or a private health insurance plan. *Id.*; see also CAPPS, *supra* note 50, § 122(d)(3).

language will be explored in more detail in the examination of H.R. 3962.)

Planned Parenthood, the nation's largest abortion provider,<sup>55</sup> characterized the Capps Amendment as a "fair and reasonable compromise."<sup>56</sup> The Center for Reproductive Rights (CRR), a pro-abortion litigation organization, described the Amendment as "a defensive move primarily intended to ward off hostile Congressional amendments to women's abortion coverage." CRR later wrote that they "draw[ ] the line at the Capps Amendment for addressing abortion in the healthcare bill."<sup>57</sup>

However, the United States Conference of Catholic Bishops (USCCB), who long supported "universal health care reform," decried the Capps Amendment as being "crafted by members of Congress who have long opposed the Hyde Amendment and other restrictions on federal abortion funding, [and] mark[ing] a very significant shift away from longstanding current policies and toward government support of abortion."<sup>58</sup> Cardinal Justin Rigali, Pro-life Secretariat of the USCCB, called the "compromise" provisions of the Capps language "an illusion" and "a legal fiction."<sup>59</sup>

Other pro-life groups expressed the same sentiment in their opposition to the Capps language. For example, the National Right to Life Committee (NRLC) said the Capps Amendment "would actually enact key pro-abortion policy goals."<sup>60</sup> NRLC Legislative Director, Doug Johnson, explained,

Abortionists would send bills for abortions to the federal Department of Health and Human Services, and they would receive payment checks drawn on a federal Treasury

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55. See *Planned Parenthood: Abortion Provider*, NAT'L RIGHT TO LIFE COMM., <http://www.nrlc.org/abortion/ppprov.html> (last visited Apr. 7, 2011).

56. PLANNED PARENTHOOD, QUESTIONS AND ANSWERS ON THE STUPAK AMENDMENT 2 (2009), [http://napawf.org/wp-content/uploads/2009/11/Stupak-Pitts\\_QA\\_111709\\_vFinal.pdf](http://napawf.org/wp-content/uploads/2009/11/Stupak-Pitts_QA_111709_vFinal.pdf) [hereinafter QUESTIONS].

57. Press Release, Ctr. for Reprod. Rights, Center for Reproductive Rights Calls on Senators to Hold the Line on Abortion Funding as Gang of Six Huddles This Weekend (Sept. 11, 2009), available at <http://reproductiverights.org/en/press-room/center-for-reproductive-rights-calls-on-senators-to-hold-the-line-on-abortion-funding-as->.

58. SECRETARIAT OF PRO-LIFE ACTIVITIES, U.S. CONFERENCE OF CATHOLIC BISHOPS, MYTHS AND FACTS: THE CAPPS AMENDMENT TO H.R. 3962, at 1 (2009), available at [http://www.usccb.org/prolife/issues/healthcare/capps\\_3962.pdf](http://www.usccb.org/prolife/issues/healthcare/capps_3962.pdf).

59. Letter from Joseph Cardinal Rigali, Chairman, U.S. Conference of Catholic Bishops Pro-Life Activities, to United States House of Representatives (Aug. 11, 2009), available at <http://www.usccb.org/prolife/CardRigaliHealthCareReformLetter-08-11-09.pdf>.

60. *Congressional Democrat Leaders Push Pro-Abortion Bills Forward, Under Obama's Verbal Smokescreens*, NAT'L RIGHT TO LIFE NEWS, Oct. 2009, at 1.

account. The funds in this account would be, of course, government funds. This would be direct federal government funding of abortion, pure and simple.<sup>61</sup>

The Family Research Council (FRC) charged the Capps Amendment with being a “direct attempt to bypass the Hyde Amendment” and stated it is “pro-abortion and dramatically shifts government support to health plans that cover abortion on demand.”<sup>62</sup> Americans United for Life (AUL) also noted that the Capps Amendment would “change the status quo to embrace federal funding and coverage of abortion.”<sup>63</sup>

In the early Senate bills, efforts to attach Hyde-like language were also defeated, and instead abortion-funding language was adopted. The Senate HELP bill delegated to a medical advisory committee the role of deciding what benefits any private or public health care plan must offer.<sup>64</sup> This Committee could include abortion as a required minimum benefit.<sup>65</sup> Senator Orrin Hatch (R-Utah) offered amendments to the Senate HELP bill that would have created in health care reform the same requirements Congress applies to Medicaid spending via the Hyde Amendment.<sup>66</sup> The Hatch Amendments failed in committee on a vote of twelve to eleven.<sup>67</sup>

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61. *Id.*

62. FAMILY RESEARCH COUNCIL, THE CAPPS ABORTION AMENDMENT TO AFFORDABLE HEALTH CHOICES ACT 1–8 (2009), <http://downloads.frc.org/EF/EF09I20.pdf>.

63. Mary Harned, *The Capps Amendment is No Compromise*, AMS. UNITED FOR LIFE (Oct. 6, 2009), <http://www.aul.org/2009/10/the-capps-amendment-is-no-compromise/>.

64. The bill “[c]reate[s] a temporary, independent commission to advise the Secretary in the development of the essential health benefit package.” THE HENRY J. KAISER FAMILY FOUND., FOCUS ON HEALTH REFORM: SIDE-BY-SIDE COMPARISON OF MAJOR HEALTH CARE REFORM PROPOSALS 15 (2009), [http://www.kff.org/healthreform/upload/healthreform\\_sbs\\_full.pdf](http://www.kff.org/healthreform/upload/healthreform_sbs_full.pdf).

65. Affordable Health Choices Act, S. 1679, 111th Cong. § 3103 (2009).

66. See Press Release, Senator Orrin Hatch, U.S. Senate, Hatch Blasts Democrats’ Proposal to Force Insurance Plans to Include Abortion Providers (July 10, 2009), available at [http://hatch.senate.gov/public/index.cfm/releases?ContentRecord\\_id=65b6fc02-1b78-be3e-e040-ac88d0b67ef6&Content\\_Type\\_id=7e038728-1b18-46f4-bfa9-f4148be94d19&Group\\_id=e5b4c6c5-4877-493d-897b-d8dda1a9a3e&MonthDisplay=7&YearDisplay=2009](http://hatch.senate.gov/public/index.cfm/releases?ContentRecord_id=65b6fc02-1b78-be3e-e040-ac88d0b67ef6&Content_Type_id=7e038728-1b18-46f4-bfa9-f4148be94d19&Group_id=e5b4c6c5-4877-493d-897b-d8dda1a9a3e&MonthDisplay=7&YearDisplay=2009); AUL Action Legal Memo: A Pro-Life Look at the Health Care Reform Bills Currently in Congress, AMS. UNITED FOR LIFE, [http://www.realhealthcarerespectslife.com/?page\\_id=68](http://www.realhealthcarerespectslife.com/?page_id=68) (last revised Aug. 27, 2009). The amendments would have prevented federal funding of abortion unless the life of the mother was endangered or the pregnancy was a result of rape or incest.

67. See AUL Action Legal Memo, *supra* note 66. The only committee Democrat to vote in favor of the Hatch amendments was Sen. Robert Casey (D-Pa.). *Id.*

During mark-up, the Baucus bill was modified to remove language in its original draft that would have allowed an abortion mandate if the Hyde Amendment ever failed to be renewed.<sup>68</sup> However, the bill still provided that the government would spend six billion dollars establishing co-ops that could cover abortion, provided for tax credits that may be used to purchase insurance that covers abortion, and required at least one plan in each premium rating area to cover abortion.<sup>69</sup> An amendment offered by Senator Hatch that would have prohibited federal funds from being used for elective abortions and plans that cover such abortions failed in committee on a vote of ten to thirteen.<sup>70</sup>

### B. *Abortion Funding in the House Bill*

H.R. 3962 will be remembered for the successful application of the Hyde principles to prohibit federal funding of elective abortion. However, this was not the case at the bill's inception. When it was introduced on October 29, 2009, through language similar to the Capps Amendment, the bill allowed private health insurance plans that cover elective abortions to receive government subsidies and allowed abortions to be funded through the public option.<sup>71</sup>

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Other pro-life amendments were offered to the Senate HELP bill. Sen. Mike Enzi (R-Wyo.) offered amendments "that would have prevented taxpayer funding of abortion" (Amendments 276 and 277), and an amendment to "prevent abortion clinics from being eligible for federally qualified health center grants" (Amendment 275). Sen. Tom Coburn (R-Okla.) offered "amendments [that] would have ensured no abortion mandates ([Amendment] 270), prevented abortion clinics from being eligible for federally qualified health center grants ([Amendment] 273) and prevented the invalidation of state laws that regulate abortions ([Amendment] 272)." Sen. Pat Roberts (R-Kan.) offered an amendment to prevent "the invalidation of state laws regulating abortion" (Amendment 204). These amendments all failed on a vote of twelve to eleven. *Id.*

68. *Leading Pro-Life Group Cautions that Abortion Concerns Are Still a Reality with the Baucus Bill*, AMS. UNITED FOR LIFE (Sept. 16, 2009), <http://blog.aul.org/2009/09/30/update-amendments-in-senate-finance-committee-mark-up/#>.

69. S. COMM. ON FIN., 111TH CONG., CHAIRMAN'S MARK: AMERICA'S HEALTHY FUTURE ACT OF 2009 (2009), <http://s3.amazonaws.com/nytdocs/docs/40/40.pdf>.

70. Sen. Olympia Snow (R-Me.) crossed party lines to vote against the amendment and Sen. Kent Conrad (D-N.D.) crossed party lines to support the amendment. Jeffrey Young, *Committee Votes Down Abortion Amendment*, THE HILL (Sept. 30, 2009, 10:32 AM), <http://thehill.com/blogs/blog-briefing-room/news/60911-committee-votes-down-abortion-amendment>.

71. Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 222(e)(2) (2009) (as introduced in the House, Oct. 29, 2009).



The language of the bill did prohibit *requiring* elective abortion as part of the essential benefits package offered by exchange-participating insurance plans:

(e) ABORTION COVERAGE PROHIBITED AS PART OF MINIMUM BENEFITS PACKAGE.—

(1) PROHIBITION OF REQUIRED COVERAGE.—

The Health Benefits Advisory Committee may not recommend under section 223(b), and the Secretary may not adopt in standards under section 224(b), the services described in paragraph (4)(A) or (4)(B) as part of the essential benefits package and the Commissioner may not require such services for qualified health benefits plans to participate in the Health Insurance Exchange.<sup>72</sup>

While not coercing insurance plans into providing abortion coverage is positive, the effect of this provision should not be overstated. First, health plans receiving federal dollars were *not prohibited* from providing abortion coverage:

(2) VOLUNTARY CHOICE OF COVERAGE BY PLAN.—

In the case of a qualified health benefits plan, the plan is *not required (or prohibited)* under this Act from providing coverage of services described in paragraph (4)(A) or (4)(B) and the QHBP offering entity shall determine whether such coverage is provided.<sup>73</sup>

What this means is that while private plans would not be *forced* to offer elective abortion coverage, should they choose to offer such coverage they would be eligible for federal funding—a change from longstanding federal law and policy.

Second, these insurance plans receiving federal funding merely had to “segregate” their funding by an accounting method:

(2) SEGREGATION OF FUNDS.—If a qualified health benefits plan provides coverage of services described in section 222(d)(4)(A), the plan shall provide assurances satisfactory to the Commissioner that—

(A) any affordability credits provided under subtitle C of title II are not used for purposes of paying for such services; and

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72. *Id.* § 222(e)(1). Paragraph (4)(A) is referring to abortions for which funding is prohibited by the Hyde Amendment during that fiscal year. *Id.* § 222(d)(4)(A). Paragraph (4)(B) is referring to abortions for which funding would *not* be prohibited by the Hyde Amendment during that fiscal year. *Id.* § 222(e)(4)(B).

73. *Id.* § 222(e)(2) (emphasis added).

(B) only premium amounts attributable to the actuarial value described in section 213(b) are used for such purpose.<sup>74</sup>

This language purports to separate “federal dollars” from “private dollars.” However it allows government dollars to go to private plans that cover abortion. As previously explained, federal law has historically treated the provision of subsidies to insurance plans that cover abortions as equivalent to paying for abortions.

Third, while not reflecting the principles of the Hyde Amendment, the bill tied its promise against requiring abortion coverage and its segregation of funds requirement to the Hyde Amendment’s continued existence:

(4) ABORTION SERVICES.—

(A) ABORTIONS FOR WHICH PUBLIC FUNDING IS PROHIBITED—The services described in this subparagraph are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted, *based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.*<sup>75</sup>

(B) ABORTIONS FOR WHICH PUBLIC FUNDING IS ALLOWED—The services described in this subparagraph are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted, *based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.*<sup>76</sup>

Thus, if the Hyde Amendment were not renewed, the restriction on direct funding of abortion within the insurance exchanges would lapse. Contrary to assertions of Democratic leadership during the debate, the abortion lobby has made it no secret that eliminating the Hyde Amendment is its top priority.<sup>77</sup>

Fourth, though not mandating *each* insurance plan directly reimburse for abortion, H.R. 3962 would also have changed the status quo of government neutrality on abortion coverage for private insurance plans. While stating that every area of the country must have one private plan that does not cover abortion, the bill

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74. *Id.* § 303(e)(2).

75. *Id.* § 222(e)(4)(A) (emphasis added).

76. *Id.* § 222(e)(4)(B) (emphasis added).

77. Email from Terry O’Neill, President of the National Organization of Women (Jan. 21, 2010, 4:55 PM) (on file with the Notre Dame Journal of Law, Ethics & Public Policy) (“We stand stronger than ever in our commitment to . . . repeal the Hyde Amendment . . .”).

simultaneously required that all areas of the country contain at least one private plan that *does* cover abortion:

(1) ASSURED AVAILABILITY OF VARIED COVERAGE THROUGH THE HEALTH INSURANCE EXCHANGE.—

The Commissioner shall assure that, of the Exchange participating health benefits plan offered in each premium rating area of the Health Insurance Exchange—

(A) there is at least one such plan *that provides coverage* of services described in subparagraphs (A) and (B) of section 222(d)(4).<sup>78</sup>

Moreover, the extent to which any insurance plan could be “pro-life” was limited by the bill’s non-discrimination clause:

(d) NO DISCRIMINATION ON THE BASIS OF PROVISION OF ABORTION.—No Exchange participating health benefits plan may discriminate against any individual health care provider or health care facility because of its willingness *or unwillingness* to provide, pay for, provide coverage of, or refer for abortions.<sup>79</sup>

This clause would prohibit insurance plans from refusing to contract with abortion providers, such as Planned Parenthood, on the basis that they provide abortions.

H.R. 3962 also explicitly allowed the HHS Secretary to include *all* abortions in the public option—regardless of the Hyde Amendment’s existence:

(3) COVERAGE UNDER PUBLIC HEALTH INSURANCE OPTION.—The public health insurance option shall provide coverage for services described in paragraph (4)(B). *Nothing in this Act shall be construed as preventing the public health insurance option from providing for or prohibiting coverage of services described in paragraph (4)(A).*<sup>80</sup>

Importantly, an abortion mandate would be triggered in the Hyde Amendment’s absence. The public option “*shall* provide coverage for services described in (4)(B).”<sup>81</sup> If the Hyde Amendment was not renewed, the public option would be required to fund all elective abortions.

In short, while the Capps Amendment was promoted as a “compromise,” the legal effect of the Capps language would have been a radical departure from longstanding federal law and policy. In effect, it inverted the Hyde Amendment—government

78. Affordable Health Care for America Act, H.R. 3962, 111th Cong. § 303(e)(1) (2009) (as introduced in the House, Oct. 29, 2009).

79. *Id.* § 304(d) (emphasis added).

80. *Id.* § 222(e)(3) (emphasis added).

81. *Id.* § 222(e)(3) (emphasis added).

funding of abortion was explicitly permitted, and potentially mandated.

Several pro-life Democrats in the House, led by Rep. Stupak, objected to the abortion-funding provisions of the bill. They requested the Stupak-Pitts Amendment<sup>82</sup> be allowed an up-and-down vote in the House.<sup>83</sup> By removing the abortion-funding language in the bill and instead codifying the Hyde Amendment principles, the Stupak-Pitts Amendment preserved the status quo of federal law. The Stupak-Pitts Amendment restriction would ensure that individuals who chose to accept affordability credits from the government to help pay for insurance would enroll in an insurance plan that does not cover elective abortions.<sup>84</sup>

Under the amendment, any woman would have been able to purchase separate supplemental coverage that covered abortion, provided it is paid for entirely by funds not authorized or appropriated by the bill.<sup>85</sup> Private insurance companies participating in the Exchange could still offer supplemental coverage for abortions or a plan that included abortion so long as premiums were paid for entirely with private funds and administrative costs and all services offered through such supplemental coverage were paid for using only premiums collected for that coverage or plan.<sup>86</sup>

It is important to note that under the Stupak-Pitts Amendment, every insurance company that included a plan in the Exchange that covered abortion would have to include a second plan that was identical to the first plan in every aspect *except* that it did not cover abortion.<sup>87</sup> Therefore, everyone who purchased insurance through the Exchange would have access to the same coverage, with the only exception being that those who receive affordability credits could not use those government dollars to purchase insurance plans that included abortion coverage.<sup>88</sup>

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82. H. Amdt. 509, 111th Cong. (2009).

83. Molly K. Hooper & Mike Soraghan, *Up-or-Down Vote on an Amendment to Block Abortion Funding Approved*, THE HILL (Nov. 7, 2009, 1:27 AM), <http://thehill.com/homenews/house/66789-stupak-to-get-up-or-down-vote-on-amendment-to-block-abortion-funding>.

84. H. Amdt. 509, 111th Cong. § 265(a) (2009).

85. *Id.* § 256(b).

86. *Id.* § 256(c)(1)–(2).

87. *Id.* § 256(c)(3).

88. Bart Stupak, Op-Ed, *What My Amendment Won't Do*, N.Y. TIMES, Dec. 8, 2009, at A43.

House leadership was at first insistent that such an amendment would not be allowed.<sup>89</sup> However, on November 6, 2009, the Rules Committee agreed to allow the Stupak-Pitts Amendment to have a vote on the House floor.<sup>90</sup>

On November 7, 2009 the Stupak-Pitts Amendment passed in the House on a vote of 240 to 195, with sixty-four Democrats voting for the amendment, forty-one who then voted for the bill.<sup>91</sup> (The bill then passed the House by a vote of 220 to 215.)<sup>92</sup>

Pro-abortion House members were infuriated when the amendment passed. The Democrats' chief deputy whip in the House, Rep. Debbie Wasserman Schultz (D-Fla.), stated in an MSNBC interview, "I am confident that when it comes back from the conference committee that that language won't be there . . . . And I think we're all going to be working very hard, particularly the pro-choice members, to make sure that's the case."<sup>93</sup> Rep.

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89. Dana Bash et al., *Abortion Threatens House Health Care Bill*, CNN (Nov. 5, 2009, 11:26 PM), <http://www.cnn.com/2009/POLITICS/11/06/health.care/>.

90. H.R. Res. 903, 111th Cong. (2009).

91. The sixty-four Democrats voting for the Amendment were Reps. Jason Altmire (Pa.), Joe Baca (Cal.), John Barrow (Ga.), Marion Berry (Ark.), Sanford Bishop (Ga.), John Boccieri (Ohio), Dan Boren (Okla.), Bobby Bright (Ala.), Dennis Cardoza (Cal.), Chris Carney (Pa.), Ben Chandler (Ky.), Travis Childers (Miss.), Jim Cooper (Tenn.), Jim Costa (Cal.), Jerry Costello (Ill.), Henry Cuellar (Tex.), Kathy Dahlkemper (Pa.), Artur Davis (Ala.), Lincoln Davis (Tenn.), Joe Donnelly (Ind.), Mike Doyle (Pa.), Steve Driehaus (Ohio), Brad Ellsworth (Ind.), Bob Etheridge (N.C.), Bart Gordon (Tenn.), Parker Griffith (Ala.), Baron Hill (Ind.), Tim Holden (Pa.), Paul Kanjorski (Pa.), Marcy Kaptur (Ohio), Dale Kildee (Mich.), James Langevin (R.I.), Daniel Lipinski (Ill.), Stephen Lynch (Mass.), Jim Marshall (Ga.), Jim Matheson (Utah), Mike McIntyre (N.C.), Charlie Melancon (La.), Michael Michaud (Neb.), Alan Mollohan (W. Va.), John Murtha (Pa.), Richard Neal (Mass.), James Oberstar (Minn.), David Obey (Wis.), Solomon Ortiz (Tex.), Tom Perriello (Va.), Collin Peterson (Minn.), Earl Pomeroy (N.D.), Nick Rahall (W. Va.), Silvestre Reyes (Tex.), Ciro Rodriguez (Tex.), Mike Ross (Ark.), Timothy Ryan (Ohio), John Salazar (Colo.), Heath Shuler (N.C.), Ike Skelton (Mo.), Vic Snyder (Ark.), Zack Space (Ohio), John Spratt (S.C.), Bart Stupak (Mich.), John Tanner (Tenn.), Gene Taylor (Miss.), Harry Teague (N.M.), Charlie Wilson (Ohio). *Final Vote Results for Roll Call 884*, HOUSE.GOV, <http://clerk.house.gov/evs/2009/roll884.xml> (last visited Apr. 20, 2011).

92. One Republican, Joseph Cao (La.) voted in favor of the bill. *House Vote on Passage: H.R. 3962*, GOVTRACK (Nov. 7, 2009), <http://www.govtrack.us/congress/vote.xpd?vote=h2009-887>.

93. Michael O'Brien, *Senior Democrat is 'Confident' That Stupak Amendment Will Be Stripped*, THE HILL'S BLOG BRIEFING ROOM (Nov. 9, 2009, 11:50 AM), <http://thehill.com/blogs/blog-briefing-room/news/66969-senior-dem-confident-stupak-amendment-will-be-stripped>.

Diana DeGette (D-Colo.) was also adamant, "We're not going to let this into law."<sup>94</sup>

Planned Parenthood published a "Q & A" form about the Stupak-Pitts Amendment. Planned Parenthood answered the question, "How do you expect to get the amendment stripped when Stupak was passed by a 40-vote margin?" by relying on its confidence in the pro-abortion Senate: "[T]he debate now turns to the Senate where cooler heads often prevail. A number of senators have publicly stated that there is not enough support for Stupak on the Senate floor."<sup>95</sup>

Though the Stupak-Pitts Amendment was approved, serious concerns about H.R. 3962, the Affordable Health Care for America Act, remained. The Rules Committee did not permit amendments to address concerns about conscience protection, the use of comparative effectiveness research, and end of life provisions.

### C. *Abortion Funding in the Senate Bill*

The final Senate bill, H.R. 3590, the Patient Protection and Affordable Care Act, passed on December 24, 2009.<sup>96</sup> The bill, which is now the law, violates the principles of the Hyde Amendment by allowing federal subsidies to be applied to insurance plans that cover abortion. Other provisions of the bill could be used to mandate abortion coverage by exchange plans and even require *all* insurance providers to cover abortion. Additionally, the Senate bill provides that if the Hyde Amendment ever fails to be renewed, federal funds may pay directly for abortion under health care reform.

The Senate HELP bill<sup>97</sup> and the Baucus bill<sup>98</sup> were never considered by the full Senate. The final Senate bill, which in large part borrowed from the Baucus bill, but was a somewhat "blended" version of the two, essentially replaced them.<sup>99</sup>

Introduced on November 19, 2009 by Majority Leader Senator Harry Reid (D-Nev.), the final Senate bill initially contained

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94. Alec MacGillis, *Abortion an Obstacle to Healthcare Bill*, WASH. POST, Nov. 9, 2009, at A1.

95. QUESTIONS, *supra* note 56, at 3.

96. See Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2009) (as passed by Senate, Dec. 24, 2009).

97. Affordable Health Choices Act, S. 1679, 111th Cong. (2009).

98. America's Health Future Act, S. 1796, 111th Cong. (2009).

99. Timothy Noah, *ReidCare: The Remix*, SLATE (Nov. 19, 2009, 1:02 PM), <http://www.slate.com/id/2236147/>.

language functionally equivalent to the Capps Amendment.<sup>100</sup> It permitted federal abortion funding in a public option, allowed federal subsidies to apply to insurance plans that covered abortion, and required that one plan with elective abortion coverage be available everywhere.

Under an amendment added by Senator Barbara Mikulski (D-Md.), *all* insurance plans—even those that do not participate in the new exchanges—must provide coverage for “preventive care” for women.<sup>101</sup> The determination of what is “preventive care” is left to an administrative agency, the Health Resources and Services Administration (HRSA). Lacking a statutory definition of “preventive care” that excludes abortion, HRSA is free to include abortion as “preventive care.” In that case, under the new law, *all insurance plans*, not just those providing coverage in the exchanges, would be required to provide abortion coverage.

The Food and Drug Administration (FDA) classifies some abortifacients, such as Intrauterine Devices (IUDs) and Plan B (the so-called “morning after pill”), as contraception even though these methods can kill an embryo by preventing implantation. Similarly, in August 2010, the FDA approved a new drug, *ella*, as contraception, even though the drug can kill an embryo *after* implantation.<sup>102</sup> There is already a push for HRSA to include “contraception” as “preventive care.”<sup>103</sup> Doing so would create a mandate for *all* insurance companies to provide coverage for these abortifacients.<sup>104</sup>

100. See Patient Protection and Affordable Care Act, H.R. 3590 § 1303 (as presented to the House on Oct. 29, 2009).

101. 155 CONG. REC. S12,013 (daily ed. Nov. 30, 2009) (amendment offered by Sen. Barbara Mikulski). The Mikulski amendment was passed by the Senate. See *Roll Call Votes on S. Amdt. 2791 to S. Amdt. 2786 to H.R. 3590*, U.S. SENATE (Dec. 3, 2009), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00355](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00355).

102. FOOD & DRUG ADMIN., FULL PRESCRIBING INFORMATION: ELLA 5 (2010), [http://www.accessdata.fda.gov/drugsatfda\\_docs/label/2010/022474s001bl.pdf](http://www.accessdata.fda.gov/drugsatfda_docs/label/2010/022474s001bl.pdf) (approving the drug for use but noting that the drug may “affect” implantation, and indicating that it should not be taken in cases of known or suspected pregnancy).

103. See Jorge Dreweke, *Contraception Should be Among Women’s Preventive Health Services that are Covered Without Cost*, GUTTMACHER INSTITUTE MEDIA CTR. (June 3, 2010), <http://www.guttmacher.org/media/nr/2010/06/03/index.html>. See also Sarah Kliff, *Free Birth Control Under Health Care?*, POLITICO (June 1, 2010, 4:36 AM), <http://www.politico.com/news/stories/0510/37980.html>.

104. See Comment from William L. Saunders, Senior Vice President of Legal Affairs, Ams. United for Life, to the Office of Consumer Info. & Ins. Oversight (Sept. 2010), *available at* <http://www.aul.org/wp-content/uploads/2010/09/Americans-United-for-Life-Comment-on-OCIIO.9992.pdf> (commenting on the HHS interim final rule for group health plans and health insurance issuers relating to the coverage of preventive services, urging that “preventive care” not

Amendments in the Senate were defeated which would have ensured “preventive care” did not include abortion. For example, an amendment offered by Senator Lisa Murkowski (R-Ark.) to ensure the government would not classify abortion as “preventive care” or as a “preventive service” was defeated by a vote of forty-one to fifty-nine.<sup>105</sup>

Senators Ben Nelson (D-Neb.), Orrin Hatch (R-Utah), and Bob Casey, Jr. (D-Pa.) offered a bipartisan amendment to prevent federally funded abortion (similar to the Stupak-Pitts Amendment that was added to the House bill), and to ensure *no provision* of the bill could be used to create an abortion mandate (responding to concerns about the Mikulski Amendment).<sup>106</sup> The Amendment effectively failed when it was tabled on a vote of fifty-four to forty-five.<sup>107</sup>

However, it appeared that the abortion-funding language could stall the health care reform bill from moving forward. In order to avoid a filibuster, sixty votes were needed in the Senate on a series of “cloture” motions (cloture limits the time for debate on a bill).<sup>108</sup> Although there were sixty Democrats, Senator Ben Nelson refused to accept early “compromise” offers on abortion funding.<sup>109</sup> He announced that prohibiting abortion

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include abortion and abortifacients); *see also* ANTHONY R. PICARELLO, JR. & MICHAEL F. MOSES, U.S. CONFERENCE OF CATHOLIC BISHOPS, COMMENT ON THE INTERIM FINAL RULES (2010), <http://www.usccb.org/ogc/preventive.pdf>.

105. *See Roll Call Votes on S. Amdt. 2836 to S. Amdt. 2786 to H.R. 3590*, U.S. SENATE (Dec. 3, 2009), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00356](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00356); *see* 155 CONG. REC. S12, 164–257 (daily ed. Dec. 2, 2009) (amendment offered by Sen. Murkowski).

106. In addition, the amendment was cosponsored by Senators Brownback, Thune, Enzi, Coburn, Johanns, Vitter and Barrasso. *See* BILL SUMMARY AND STATUS, 111TH CONG. (2009–2010), S. Amdt. 2962, *available at* <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SP2962>.

107. Seven Democrats voted against tabling the amendment: Bayh (Ind.), Casey (Pa.), Conrad (N.D.), Dorgan (N.D.), Kaufman (Del), Nelson (Neb.), and Pryor (Ark.). *See Roll Call Votes on S. Amdt. 2962 to S. Amdt. 2786 to H.R. 3590*, U.S. SENATE (Dec. 8, 2009), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00369](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00369).

108. MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 48 (2nd ed. 2008) (noting that time for debate will often be controlled by “unanimous consent agreements” and rule-making statutes, but that a consent order or statutory provision that does not provide finality creates a loophole that will permit filibuster, or an unlimited possibility for amendments after debate has concluded, whereas cloture imposes a limitation on consideration of amendments and limits debate to 30 hours).

109. Press Release, Office of Senator Ben Nelson, U.S. Senate, Nelson Comments on Abortion Compromise (Dec. 17, 2009), *available at* [http://ben-nelson.senate.gov/press/press\\_releases/121709-01.cfm](http://ben-nelson.senate.gov/press/press_releases/121709-01.cfm) (Sen. Nelson rejected



funding was “non-negotiable” and that he was willing to filibuster the bill.<sup>110</sup>

On December 19, 2009, the Manager’s Amendment to the Senate bill, offered by Majority Leader Reid, dropped the public option from the bill<sup>111</sup> and purported to be a compromise regarding abortion funding and federal subsidies.<sup>112</sup> Senator Ben Nelson, announcing his decision to vote for the bill, remarked, “We have an agreement that the plan will not use federal dollars to fund abortions. . . . I believe we have accomplished that goal. It’s clear I wouldn’t have voted for this bill without

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the Casey “compromise” language, a proposal by Sen. Bob Casey (D-Pa.) that would not have changed the abortion funding provisions but would have provided funding for adoption and pregnant teens. Sen. Nelson responded, “The compromise adds important new initiatives addressing teen pregnancy and tax credits to help with adoptions. These are valuable improvements that will make a positive difference and promote life. But as it is, without modifications, the language concerning abortion is not sufficient.”).

110. E.g., Carrie Budoff Brown, *Nelson Will Filibuster a Bill Without Stronger Anti-Abortion Language*, POLITICO (Dec. 3, 2009, 12:22 PM), [http://www.politico.com/livepulse/1209/Nelson\\_will\\_filibuster\\_a\\_bill\\_without\\_stronger\\_antiabortion\\_language.html](http://www.politico.com/livepulse/1209/Nelson_will_filibuster_a_bill_without_stronger_antiabortion_language.html); see also Janet Adamy & Greg Hitt, *Abortion Emerges as Top Bill Threat*, WALL ST. J., Dec. 7, 2009, at A5.

111. *Dems Make Deal to Drop Public Option*, CBS NEWS (Dec. 8, 2009, 11:35 PM), <http://www.cbsnews.com/stories/2009/12/08/politics/main5943452.shtml>.

112. Amendment to improve the bill, H.R. 3590, 111th Cong. 1st Sess. 2009, available at [http://www.politico.com/static/PPM145\\_chris.html](http://www.politico.com/static/PPM145_chris.html). Note that the Senate bill creates “premium assistance credits,” which are subsidies offered on a sliding scale to individuals earning up to 400% of the federal poverty level, which are meant to help pay for health insurance. PPACA, Pub. L. No. 111-148, § 1401, 124 Stat. 119, 213–19 (2010). These credits are for those who are not eligible for Medicaid. See *Mandatory Eligibility Groups*, CTRS. FOR MEDICARE & MEDICAID SERVS., [https://www.cms.gov/MedicaidEligibility/03\\_MandatoryEligibilityGroups.asp#TopOfPage](https://www.cms.gov/MedicaidEligibility/03_MandatoryEligibilityGroups.asp#TopOfPage) (last modified Dec. 14, 2005) (explaining that the Hyde Amendment will continue to apply to individuals covered under Medicaid (those under 133% of the federal poverty level) as long as the Hyde Amendment is offered and succeeds each year under the LHHS Appropriations bill). The credits may only be used to purchase insurance coverage within a state-established Exchange. The PPACA mandates that by January 1, 2014 the “American Health Benefit Exchanges” will be established in each individual state. PPACA § 1401, 124 Stat. at 213–19. These Exchanges will provide access to “Qualified Health Plans” for qualified individuals and employers. *Id.* § 1331(b), 124 Stat. at 200. Though these subsidies are called “tax credits,” the Department of the Treasury issues them directly to the insurer, not to the taxpayer. *Id.* § 1412(c), 124 Stat. at 232–33. Since the subsidies do not pass through the LHHS appropriations process, the restrictions of the Hyde Amendment do not apply.

these conditions.”<sup>113</sup> Since it secured the vote of Senator Nelson, the necessary sixtieth vote for the bill’s passage, the Manager’s Amendment has been referred to as the “Nelson compromise.”<sup>114</sup>

However, the abortion language, which was drafted with the aid of pro-abortion Senator Barbara Boxer (D-Cal.),<sup>115</sup> was a break from longstanding federal law and policy.<sup>116</sup> It permits federal subsidies to be used towards insurance plans with abortion coverage.<sup>117</sup>

The Manager’s Amendment requires insurance plans that cover abortion to utilize an accounting separation of funds.<sup>118</sup> Insurance companies receiving federal funds are required to create an account that only contains money collected directly from citizens and employers from which they pay for abortions, and this account must exclude government subsidies. The bill’s accounting separation actually *mandates* that every person who participates in the exchanges and whose insurance plan covers abortion must now pay a minimum of twelve dollars per year<sup>119</sup> *directly* in order to fund abortion, even if that enrollee never intends to have an abortion or has a moral objection to abortion.<sup>120</sup>

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113. Kerry Pickett, *Sen. Reid Plays Down Nelson Medicaid Buyoff*, WASH. TIMES WATER COOLER BLOG (Dec. 19, 2009), <http://www.washingtontimes.com/weblogs/watercooler/2009/dec/19/sen-reid-plays-down-nelson-medicaid-buy/>.

114. Shailagh Murray & Lori Montgomery, *Deal on Health Bill is Reached, Health-Care Overhaul 2010*, WASH. POST, Dec. 20, 2009, at A1.

115. Paul Kane, *To Sway Nelson, a Hard-Won Compromise on Abortion Issue*, WASH. POST, Dec. 20, 2009, at A06. See also *2010 Scorecard and Voter Guide*, PLANNED PARENTHOOD, <http://www.plannedparenthoodaction.org/elections-politics/2010-elections-map.htm#/california> (last visited Feb. 25, 2011) (noting Senator Boxer’s 100% pro-choice status).

116. Americans United for Life has created a comparison of the Hyde Amendment (and other existing federal policies prohibiting abortion funding with federal dollars) to the abortion funding provisions of the House-passed and Senate-passed bills. Memorandum from Ams. United for Life to Pro-Life Members of Congress (Jan. 6, 2010), *available at* <http://www.realhealthcarerespectslife.com/wp-content/uploads/2009/10/Comparison1.pdf>.

117. See H.R. 3590, 111th Cong. § 1303 (2009) (as amended in Senate).

118. *Id.* § 1303(b)(2).

119. *Id.* § 1303(a)(2)(C)(ii)(III) (providing that in determining the cost paid into the abortion account, the issuer “may not estimate such a cost at less than \$1 per enrollee, per month”).

120. *Id.* § 1303(b)(2)(B). The Section states:

(B) ESTABLISHMENT OF ALLOCATION ACCOUNTS.—In the case of a plan to which subparagraph (A) applies, the issuer of the plan shall—(i) collect from each enrollee in the plan (without regard to the enrollee’s age, sex, or family status) a separate payment for each of the following:

Perhaps even more important, the limited funding restriction of the Manager's Amendment was designed to disappear. Like the Capps language, the bill ties its requirement for an accounting separation to the Hyde Amendment's continued existence:

(B) ABORTION SERVICES.—

(i) ABORTIONS FOR WHICH PUBLIC FUNDING IS PROHIBITED.—The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.

(ii) ABORTIONS FOR WHICH PUBLIC FUNDING IS ALLOWED.—The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved.<sup>121</sup>

Therefore, the restriction on direct funding of abortion within the insurance exchanges lapses if Congress does not renew the Hyde Amendment. As noted above, the abortion lobby is actively campaigning for the removal of the Hyde Amendment.

The Manager's Amendment purported to be a new compromise because it allows a state to "opt-out" of funding abortion within its insurance exchange:

(a) STATE OPT-OUT OF ABORTION COVERAGE.—

(1) IN GENERAL.—A State may elect to prohibit abortion coverage in qualified health plans offered through an

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(I) an amount equal to the portion of the premium to be paid directly by the enrollee for coverage under the plan of services other than services described in paragraph (1)(B)(i) (after reduction for credits and cost-sharing reductions described in subparagraph (A)); and

(II) an amount equal to the actuarial value of the coverage of services described in paragraph (1)(B)(i) and

(ii) shall deposit all such separate payments into separate allocation accounts as provided in subparagraph (C).

In the case of an enrollee whose premium for coverage under the plan is paid through employee payroll deposit, the separate payments required under this subparagraph shall each be paid by a separate deposit.

*Id.*

121. *Id.* § 1303(b)(1)(B).

Exchange in such State if such State enacts a law to provide for such prohibition.<sup>122</sup>

However, this changes the baseline from one where abortion will not be even indirectly federally subsidized to one requiring states to take *affirmative* legislative action to prohibit federal health care funds from subsidizing plans that provide abortion coverage.

The “opt-out” is also limited in effect. It only allows a state to prohibit subsidies within its state exchange from being applied to abortion-covering insurance plans. Thus, to use Senator Nelson’s home state of Nebraska as an example, should Nebraska pass “opt-out” legislation, federal taxes collected from Nebraskans will still be used to subsidize abortion in non-opt-out states, such as New York and California.

In addition, the Mikulski Amendment could undermine the opt-out provision. The Manager’s Amendment contains language that would prevent abortion from being mandated through the “essential health benefits” determination.<sup>123</sup> However, this language fails to prevent an abortion mandate from HRSA under the Mikulski amendment. The Mikulski Amendment does not address the determination of “essential health benefits.” A mandate by HRSA would be made under the “preventive care” requirement for all insurance plans—even those not participating in the insurance exchanges.

Moreover, these “restrictions” on abortion funding only apply to the subsidies used in the insurance exchanges. Other funding streams created by the bill lack any prohibition. Such funding streams include the \$9.5 billion appropriated for Community Health Centers (CHCs),<sup>124</sup> and funds appropriated through the “high-risk pools.”<sup>125</sup> As detailed above, because federal courts have interpreted health language to include abortion,

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122. *Id.* § 1303(a).

123. *Id.* § 1303(b)(1)(A)(i).

124. The Senate bill self-appropriated \$7 billion in funding for CHCs. The reconciliation bill passed by the House and Senate increased that amount to \$9.5 billion. Health Care Reconciliation Act of 2010, Pub. L. No. 111-152, § 2303, 124 Stat. 1029, 1083.

125. *Pre-Existing Condition Insurance Plan*, HEALTHCARE.GOV, <http://www.healthcare.gov/law/provisions/preexisting/about/index.html> (last visited Apr. 23, 2011) (explaining that until 2014, when state insurance exchanges begin, the Pre-Existing Condition Insurance Plan (PCIP) requires states to provide health coverage for individuals who have been uninsured for at least six months and have a pre-existing condition or have been denied health coverage because of a health condition, commonly referred to as “high-risk pools,” and that States can either run this new program with resources made available by the PPACA, or rely on the Department of Health and Human Services to provide coverage).

failure to include a broad prohibition likely means these funds can cover abortion.<sup>126</sup>

However, the changes to the underlying bill made by the Manager's Amendment were enough to gain the support of sixty Democrats in the Senate, and the bill passed on December 24, 2010.<sup>127</sup> Thus, heading into the winter recess there were two bills—one passed by the House and one by the Senate. The House bill, since the addition of the Stupak-Pitts Amendment, conformed to existing law and policy to prohibit federal funding of abortion. The Senate bill, while purporting to be a compromise, permitted federal funding of abortion. The question on many Americans' minds was how these two bills would be reconciled in conference and which abortion language would ultimately survive. News reports indicated that issues such as abortion could extend the health care debate past the State of the Union address and into February.<sup>128</sup>

#### IV. HOW THE BILL BECAME THE LAW

Rumors that health care reform might not be passed through the usual process (reconciling the House and Senate bills in a "conference" and then passing the conference report in each chamber) had surfaced late in 2009. However, the election of Scott Brown (a Republican) in Massachusetts, on January 19, 2010, to replace the late Ted Kennedy (a Democrat), made the prospect of passing a conference report in the Senate improbable.<sup>129</sup> With Brown's election, the Republicans had forty-one votes in the Senate, breaking the Democrats' filibuster-proof majority. Since all the Republicans opposed the sweeping health care bills, the prospect of resolving the differences between the House and Senate bills and then passing that amended bill in the Senate seemed impossible. Employing the usual process would

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126. See *Planned Parenthood v. Engler*, 73 F.3d 634 (6th Cir. 1996); *Hope Med. Group for Women v. Edwards*, 63 F.3d 418 (5th Cir. 1995); *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995).

127. *Roll Call Votes on Amended H.R. 3590*, U.S. SENATE (Dec. 24, 2009), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=1&vote=00396](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=1&vote=00396).

128. Mike Allen & Alexander Trowbridge, *Obama Plans For Health Care Delay, New Jobs Bill*, POLITICO (Dec. 23, 2009, 9:25 AM), <http://www.politico.com/news/stories/1209/30925.html>.

129. *Brown Wins Massachusetts Senate Race* (CNN television broadcast Jan. 19, 2010), available at <http://www.cnn.com/2010/POLITICS/01/19/massachusetts.senate/index.html?hpt=T1>.

require health care reform to begin anew, something polls reflected that most Americans wanted.<sup>130</sup>

### A. President Obama's "Plan"

On February 22, 2010, President Obama unveiled what was touted as "his" version of health care reform.<sup>131</sup> The President's plan was not written in legislative language as a bill, but was a series of proposals that proffered to "bridge[ ] the gap between the House and Senate bills."<sup>132</sup> The significance of the President's plan is perhaps negligible, as it had no prospect of becoming a piece of legislation that would pass in both chambers. However, notably, one "gap" between the bills that the proposal did not seek to bridge was the abortion-funding language. Contrary to the President's promise in September that "no federal dollars will be used to fund abortions,"<sup>133</sup> the White House stated that under the President's plan the abortion-funding language of the Senate bill would be preserved.<sup>134</sup>

On February 25, 2010, the President convened the Blair House health care summit. Instead of being an event to reach a bipartisan solution, it was clear that the President and Democrat leadership were not interested in revisiting the one part of health care reform that had received strong bipartisan support: the Stupak-Pitts Amendment and its prohibition of abortion funding that overwhelmingly passed in the House.

In a statement addressing a variety of issues, Minority Leader Boehner expressed his concerns about taxpayer-funded abortion.<sup>135</sup> President Obama responded generally, saying, "There

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130. *Health Care Reform*, RASMUSSEN REPORTS (Mar. 21, 2010), [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/health\\_care/september\\_2009/health\\_care\\_reform](http://www.rasmussenreports.com/public_content/politics/current_events/health_care/september_2009/health_care_reform) (reporting that national polls showed 54% of Americans opposed the proposed Senate bill on March 21, 2010, a number consistent with polling results over the last several months).

131. THE PRESIDENT'S PROPOSAL OF FEBRUARY 22, 2010 (2010), <http://www.whitehouse.gov/sites/default/files/summary-presidents-proposal.pdf>.

132. *Id.* at 1.

133. President Obama Remarks, *supra* note 14.

134. Jake Tapper et al., *President Obama's Health Care Plan Proposes Fixes to Senate Bill*, ABC NEWS (Feb. 22, 2010), [http://abcnews.go.com/Politics/Health\\_Care/obama-health-care-plan-fixes-senate-bill-public-option-insurance-reform/story?id=9908361](http://abcnews.go.com/Politics/Health_Care/obama-health-care-plan-fixes-senate-bill-public-option-insurance-reform/story?id=9908361). See also John McCormack, *Pelosi Doesn't Tell the Truth About Taxpayer-Funding of Abortion in Health Bill*, THE WEEKLY STANDARD BLOG (Feb. 25, 2010, 5:48 PM), <http://www.theweeklystandard.com/blogs/pelosi-doesnt-tell-truth-about-taxpayer-funding-abortion-health-bill> (noting that House Speaker Nancy Pelosi stated that "there is no public funding of abortion in these bills").

135. Letter from Republican Leader John Boehner, U.S. House of Representatives, to President Barack Obama (Feb. 24, 2010), available at [http://www.speaker.gov/UploadedFiles/Letter\\_to\\_Obama\\_on\\_Stupak\\_Amendment](http://www.speaker.gov/UploadedFiles/Letter_to_Obama_on_Stupak_Amendment).

are so many things that you've said that [Democrats] would profoundly disagree with, and that based on my analysis just aren't true."<sup>136</sup> He also said he would return to the issues Boehner raised at the end of the meeting.<sup>137</sup>

The President failed to return to the abortion-funding issue, but House Speaker Nancy Pelosi (D-Cal.) later responded, saying that "the law of the land is there is no public funding of abortion, and there is no public funding of abortion in these bills, and I don't want our listeners or viewers to get the wrong impression."<sup>138</sup> Whether House Speaker Pelosi *meant* to deceive with her remarks, her implication that either existing law would prohibit abortion funding in health care reform, or that the bill passed by the Senate conformed to the principles of existing law, were misleading.<sup>139</sup> In the end, it seems that neither the President's plan nor his summit was meant to move anything forward besides the bill already passed by the Senate Democrats.

### B. *Reconciliation*

On March 3, the White House officially announced its strategy for the Democratic Party to "finish its work" on health care reform.<sup>140</sup> First, Democrats in the House would pass the Senate bill, which would become law when signed by the President. Second, to "amend" the law, the House would pass a reconciliation bill, which would then go to the Senate for consideration.<sup>141</sup>

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pdf (urging President Obama to include the Stupak-Pitts Amendment in the Health Care Summit on February 24, on the basis of its inclusion in the final House bill and broad bipartisan support in that chamber).

136. Brian Montopoli, *Obama to Boehner: Many Things You've Said "Just Aren't True,"* CBS News (Feb. 25, 2010, 3:46 PM), [http://www.cbsnews.com/8301-503544\\_162-6243332-503544.html](http://www.cbsnews.com/8301-503544_162-6243332-503544.html).

137. *Fact Check: Madame Speaker, Republicans & Democrats Agree President Obama's Bill Authorizes Taxpayer-Funded Abortion*, GOP LEADER BLOG (Feb. 25, 2010), <http://www.speaker.gov/Blog/?postid=188301>.

138. Kathryn Jean Lopez, *Re: 'You Lie!'*, NAT'L REVIEW ONLINE (Feb. 26, 2010, 5:05 PM), <http://www.nationalreview.com/corner/195549/re-you-lie/kathryn-jean-lopez>.

139. The funding in the Senate bill bypasses the Hyde Amendment, permits subsidies to be applied to insurance plans funding abortion, and contains potential abortion funding mandates.

140. Shailagh Murray & Lori Montgomery, *Obama Tell Congress to "Finish its Work" on Health-Care Reform; President Calls for Reconciliation to Prevent Filibuster*, WASH. POST, Mar. 4, 2010, at A07.

141. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029. The reconciliation process, which was intended to pass budgetary changes to existing laws, is considered "privileged" in the Senate, meaning it is not subject to debate and therefore not subject to a filibuster. See GOLD, *supra* note 108, at 153-55. Thus, the Democrats would only need fifty-

There were several differences between the Senate bill and the one that had previously passed the House. By mid-March it appeared that abortion funding was the last hurdle Democrats needed to overcome in the House to pass the Senate bill.<sup>142</sup>

One by one, House pro-life Democrats who favored health care reform, but who had been committed to prohibiting abortion funding, began to waver. On March 17, Rep. Kildee (D-Mich.) sent a "Dear colleague" letter to fellow House Members, expressing his support for the Senate health care bill.<sup>143</sup> Rep. Kildee stated, "As a staunch pro-life member of Congress, I did not arrive at this decision lightly or easily. However, after careful consideration I am convinced that the Senate abortion language maintains the Hyde Amendment." By March 19, Reps. Jim Oberstar (D-Minn.), John Boccheri (D-Ohio), Brad Ellsworth (D-Ind.), Charlie Wilson (D-Ohio), and Tom Perriello (D-Va.) had all announced they would vote for the Senate bill despite the abortion-funding language.<sup>144</sup>

### C. *The Executive Order*

In a statement released on December 19, 2009, Pro-life Caucus Co-chair Bart Stupak (D-Mich.) said, "While I and many other pro-life Democratic House members wish to see health care coverage for all Americans, the proposed Senate language is unacceptable."<sup>145</sup> However, only hours before the House vote, Rep. Stupak announced that he *would vote* for the bill. At a press conference with five members of his pro-life coalition, Reps. Steve Driehaus (D-Ohio), Marcy Kaptur (D-Ohio), Nick Rahall

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one votes in the Senate to pass the reconciliation bill. *Id.* While reconciliation would provide an expedited process, not every issue can be "amended" through it. The "Byrd rule" forbids "extraneous" materials, those that do not have an impact on the budget, in reconciliation bills. *Id.* at 156.

142. James White, *Abortion Remains High Hurdle in Health-Care Push*, WALL ST. J. HEALTH BLOG (Mar. 5, 2010, 1:05 PM), <http://blogs.wsj.com/health/2010/03/05/abortion-remains-high-hurdle-in-health-care-push/>.

143. See *AUL Responds to Kildee Dear Colleague Letter*, AMS. UNITED FOR LIFE (Mar. 17, 2010), <http://www.aul.org/2010/03/aul-response-to-kildee-dear-colleague-letter/>; see also Kathryn Jean Lopez, *Kildee Picks a Side*, NAT'L REVIEW ONLINE (Mar. 17, 2010), <http://www.nationalreview.com/corner/196395/kildee-picks-side/kathryn-jean-lopez>.

144. See Daniel Foster, *House Health-Care Vote Tracker*, NAT'L REVIEW ONLINE (Mar. 21, 2010), <http://www.nationalreview.com/on-the-news/421/house-health-care-vote-tracker/daniel-foster>.

145. Press Release, Representative Bart Stupak, U.S. House of Representatives, Stupak Statement on Senate Abortion Amendment (Dec. 19, 2009) (on file with the Notre Dame Journal of Law, Ethics & Public Policy); see also Ben Smith, *Stupak: 'Unacceptable'*, POLITICO (Feb. 23, 2010, 10:18 AM), [http://www.politico.com/blogs/bensmith/0210/Stupak\\_Unacceptable.html?showall](http://www.politico.com/blogs/bensmith/0210/Stupak_Unacceptable.html?showall).



(D-W. Va.), Alan Mollohan (D-W. Va.), and Kathy Dahlkemper (D-Pa.), Rep. Stupak stated his decision was due to President Obama's promise to sign an executive order applying the Hyde Amendment to the new legislation.<sup>146</sup> Rep. Stupak reported that Rep. Joe Donnelly (D-Ind.), who was unable to attend the press conference, would also vote yes.<sup>147</sup>

Before the vote, in an exchange with Rep. Harry Waxman (D-Cal.), Rep. Stupak stated on the House floor:

Throughout the debate in the House, Members on both sides of the abortion issue have maintained that current law should apply. Current law with respect to abortion services includes the Hyde amendment. The Hyde amendment and other similar statutes to it have been the law of the land on Federal funding of abortion since 1977 and apply to all other health care programs—including SCHIP, Medicare, Medicaid, Indian Health Service, Veterans Health Care, military health care programs, and the Federal Employees Health Benefits Program.

The intent behind both this legislation and the Executive order the President will sign is to ensure that, as is provided for in the Hyde amendment, that health care reform will maintain a ban on the use of Federal funds for abortion services except in the instances of rape, incest, and endangerment of the life of the mother.<sup>148</sup>

Rep. Waxman responded:

[T]hat is correct. I agree with the gentleman from Michigan that the intent behind both the legislation and the Executive order is to maintain a ban on Federal funds being used for abortion services, as is provided in the Hyde amendment.<sup>149</sup>

The Executive Order in fact acknowledged that the new health care law itself would not adequately maintain the principles of the Hyde Amendment:

[I]t is necessary to establish an adequate enforcement mechanism to ensure that Federal funds are not used for

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146. Brian Montopoli, *Stupak to Vote Yes on Health Care Bill*, CBS NEWS (Mar. 21, 2010, 4:21 PM), [http://www.cbsnews.com/8301-503544\\_162-20000845-503544.html](http://www.cbsnews.com/8301-503544_162-20000845-503544.html).

147. Jared Allen & Jeffrey Young, *Stupak, Dems Reach Abortion Deal*, THE HILL (Mar. 21, 2010), <http://thehill.com/homenews/house/88143-stupak-dems-reach-abortion-deal-eight-or-nine-will-vote-yes>.

148. 156 CONG. REC. H1854, 1859–60 (daily ed. Mar. 21, 2010) (statement of Rep. Bart Stupak).

149. *Id.* at 1860 (statement of Rep. Henry Waxman).

abortion services (except in cases of rape or incest, or when the life of the woman would be endangered), consistent with a longstanding Federal statutory restriction that is commonly known as the Hyde Amendment.<sup>150</sup>

However, while the Executive Order *referenced* the Hyde Amendment, it failed to *apply* its principles to PPACA.

First, the Executive Order cannot change or negate statutory language. Executive orders can only have the “force of law” when they do not contradict the law. The fact that statutes cannot be overridden by executive orders or regulations has been affirmed by the United States Supreme Court. In 2006, the Supreme Court struck down an executive order issued by President Bush to invoke military commission jurisdiction because Congress had *impliedly* prohibited that action.<sup>151</sup> Pro-abortion members, like Rep. Debbie Wasserman Schultz (D-Fla.), were quick to note that the Order could not change the law.<sup>152</sup>

Second, the Executive Order misleads when it says it applies/extends the Hyde Amendment to the new health care law.<sup>153</sup> As aforementioned, the Hyde Amendment prohibits federal funding for abortion *and* federal funding for insurance plans that cover abortion.<sup>154</sup> The Executive Order, however, requires “strict compliance” with the language of the PPACA that is itself *inconsistent* with the Hyde Amendment. The Order directs the Secretary of HHS to

develop . . . a model set of *segregation guidelines* for State health insurance commissioners to use when determining *whether exchange plans are complying with the Act’s segregation requirements*, established in section 1303 of the Act, for enrollees receiving Federal financial assistance.<sup>155</sup>

Thus, the Order “depart[s] from Hyde” in the same fashion that caused Rep. Stupak to reject the Capps Amendment—it “allow[s] individuals receiving federal affordability credits to purchase health insurance plans that cover abortion.”<sup>156</sup>

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150. Exec. Order No. 13,535, 75 Fed. Reg. 15,599 (Mar. 24, 2010).

151. *Hamdan v. Rumsfeld*, 548 U.S. 557, 579–80 (2006).

152. *Democrat Congresswoman Debbie Wasserman Schultz Admits Executive Order Can’t Change Law* (Fox News television broadcast Mar. 21, 2010).

153. However, § 1 then wrongly states that the Act maintains the Hyde Amendment restrictions. “The Act maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges.” 75 Fed. Reg. at 15,599.

154. *See supra* notes 29–30.

155. 75 Fed. Reg. at 15,599 (emphasis added).

156. Rep. Bart Stupak, Op-Ed., *What Our Amendment Does*, POLITICO (Nov. 18, 2009, 4:52 AM), <http://www.politico.com/news/stories/1109/29629.html>.

The Executive Order *does* apply the Hyde Amendment to new funds appropriated to Community Health Centers (CHCs).<sup>157</sup> This provision may be effective, and that would be important because \$9.5 billion in new funding is available to CHCs.<sup>158</sup> However, pro-abortion groups have been campaigning to have abortions performed in such centers and for Planned Parenthood clinics to qualify to become CHCs.<sup>159</sup> And, as noted, there is precedent for a court to rule that without explicit statutory language prohibiting abortion funding, abortion must be covered.<sup>160</sup>

The Executive Order fails to address other loopholes as well, such as the potential abortion mandate for all insurance plans created by the Mikulski Amendment.<sup>161</sup> The Order does not forbid HRSA from including abortion or abortifacients in the definition of "preventive care," something it could have done.

Finally, an executive order does not "codify" anything. It exists at the will of the President. It can be undone, or modified, by the stroke of President Obama's pen. In other words, the Executive Order is less permanent than the underlying statute.

Still, with President Obama's promise to sign the Executive Order, enough Democrat votes were secured, and the Senate-created bill passed the House 219 to 212.<sup>162</sup> Rep. Dan Lipinski (D-Ill.) was the only pro-life Democrat who voted for the bill that passed the House in November and voted against the Senate bill because it did not prohibit abortion funding.<sup>163</sup>

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157. Section 3 of the Executive Order states, "Under the Act, the Hyde language shall apply to the authorization and appropriations of funds for Community Health Centers under section 10503 and all other relevant provisions." 75 Fed. Reg. at 15,600.

158. See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2303, 124 Stat. 1029, 1083.

159. Groups such as the Reproductive Health Access Project and the Abortion Access Project strongly advocate for the inclusion of abortion services in community health centers as part of providing "primary care" and preventive services. See *Frequently Asked Questions about Integrating Abortion into Community Health Centers*, REPROD. HEALTH ACCESS PROJECT, [http://www.reproductiveaccess.org/getting\\_started/faq.htm](http://www.reproductiveaccess.org/getting_started/faq.htm) (last visited Apr. 23, 2011).

160. In health care legislation, where there is no statutory prohibition on abortion funding, courts have found implied Congressional intent to mandate abortion funding. See *supra* note 41 and accompanying text. Courts have also held that an Executive Order cannot override Congress' implied intent. See *supra* note 151 and accompanying text.

161. See *supra* note 101 and accompanying text.

162. *Final Vote Results for Roll Call 165*, HOUSE.GOV (Mar. 21, 2009), <http://clerk.house.gov/evs/2010/roll165.xml>.

163. Other pro-life Democrats who voted against the Senate bill are Representatives Jason Altmire (Pa.), John Barrow (Ga.), Marion Berry (Ark.), Dan

## V. OTHER LIFE CONCERNS IN HEALTH CARE REFORM

Other anti-life elements exist in the PPACA. They include a failure to protect conscience comprehensively, and a requirement that Comparative Effectiveness Research (CER) may be used to deny essential care. These problems existed to varying degrees in each proposed bill.

### A. Conscience Protections

Since the Obama Administration had pledged to revoke the regulations promulgated by the Bush administration to enforce federal laws guaranteeing conscience protections,<sup>164</sup> the promise made by President Obama (during his address to Congress in September 2009) that they would remain intact rang hollow.<sup>165</sup>

PPACA does prohibit discrimination against health care entities on conscience grounds by insurance plans participating in the new government exchanges. However, it does not proscribe discrimination by *government entities*. This falls short of the protection encompassed in the Hyde-Weldon Amendment, added annually to LHHS appropriations bill. The Hyde-Weldon Amendment requires that

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Boren (Okla.), Bobby Bright (Ala.), Ben Chandler (Ky.), Travis Childers (Miss.), Lincoln Davis (Tenn.), Tim Holden (Pa.), Jim Marshall (Ga.), Jim Matheson (Utah), Mike McIntyre (N.C.), Charlie Melancon (La.), Collin Peterson (Minn.), Mike Ross (Ark.), Heath Shuler (N.C.), Ike Skelton (Mo.), and Gene Taylor (Miss.). *Id.*

164. See William L. Saunders, *Washington Insider*, 9.2 NAT'L CATHOLIC BIOETHICS Q. 217, 234–35 (2009). See also William L. Saunders & Michael Fragoso, *Conscience Protection in Health and Human Services*, ENGAGE, July 16, 2009, at 115–20.

165. To address concerns about conscience protection, President Obama, meeting with representatives of the Catholic press in 2009, said, "I think that the only reason that my position may appear unclear is because it came in the wake of a last-minute, eleventh-hour change in conscience clause provisions that were pushed forward by the previous administration that we chose to reverse." *Obama Promises Conscience Protection*, ZENIT (Jul. 2, 2009), [www.zenit.org/article-26353?l=english](http://www.zenit.org/article-26353?l=english). Seeking to explain why the repeal should not raise alarm, he continued, "I can assure all of your readers that when this review is complete there will be a robust conscience clause in place. It may not meet the criteria of every possible critic of our approach, but it certainly will not be weaker than what existed before the changes were made." *Id.* It is important to recall why HHS enacted those rules last year: though federal conscience protections "existed," there was no effective enforcement mechanism. The regulations were carefully crafted after solicitation of public comment and a lengthy period of review. The regulations did not expand federal law. They allowed federal law to be enforced. To say that the repeal of the enforcement mechanism leaves conscience laws no less effective than their ineffectiveness before is not comforting.

[n]one of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, *if such agency, program, or government* subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions. In this subsection, the term “health care entity” includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.<sup>166</sup>

The new law does include a conscience protection for health care providers who do not want to participate in assisted suicide, euthanasia, or mercy killing. The law provides that the federal government, any state or local government, any health care provider that receives federal dollars under this act, or any health plan created under this act

may not subject an individual or institutional health care entity to discrimination on the basis that the entity does not provide any health care item or service furnished for the purpose of causing, or for the purpose of assisting in causing, the death of any individual, such as by assisted suicide, euthanasia, or mercy killing.<sup>167</sup>

The effect of this provision, while positive, should not be overstated. The provision prohibits discrimination against health care providers on the basis that they refuse to conduct an activity that is *illegal* in all but three states.<sup>168</sup> In the vast majority of states, it should be clear that such discrimination is prohibited because the underlying activity is prohibited.

### B. *Rationing of Essential Care*

In February 2009, the Stimulus Bill enacted by Congress included \$1.1 billion for Comparative Effectiveness Research to “determine which drugs, devices, and procedures are most effec-

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166. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (emphasis added). Likewise, the early House and Senate proposals afforded some, but not adequate, protections for conscience.

167. PPACA, Pub. L. No. 111-148, § 1553(a), 124 Stat. 119, 259 (2010).

168. Assisted suicide is allowed in Montana, Oregon, and Washington. See Matt Gouras, *Montana 3rd State to Allow Doctor-assisted Suicide*, Physorg (Jan. 1, 2010), <http://www.physorg.com/news181552607.html>.

tive and carry the lowest risk.”<sup>169</sup> The PPACA establishes the “Patient-Centered Outcomes Research Institute” to evaluate the risks and benefits of two or more medical treatments, services, or items.<sup>170</sup> This Institute presents serious concerns that the federal government could misuse results of CER to deny or ration essential care to the sick, disabled, and elderly.<sup>171</sup>

A NRLC analysis finds that the Senate bill also contains important elements that will greatly impact the ability of patients to receive unrationed medical care. These elements, combined with inadequate funding—a scheme of ‘robbing Peter to pay Paul’ wherein half of the funding comes from cuts in Medicare spending . . . will result in rationing life-saving treatment for senior citizens.<sup>172</sup>

President Obama’s appointment of Dr. Donald Berwick as director of the Centers for Medicaid and Medicare Services during the July 2010 recess has added to these concerns.<sup>173</sup> In 2008, Dr. Berwick admitted that he is “in love” with the socialized British system of rationed health care.<sup>174</sup> In an interview in 2009, he stated, “The decision is not whether or not we will ration care—the decision is whether we will ration with our eyes open.”<sup>175</sup>

Medicare and Medicaid together already insure nearly one-third of all Americans. The new health care law calls for major changes in their programs, including the expansion of Medicaid to cover 6 million more people. Dr. Berwick’s appointment

169. Emily P. Walker, *Stimulus Bill Gives \$1.1 Billion for Comparative Effectiveness Research*, MEDPAGE TODAY (Feb. 19, 2009), [www.medpagetoday.com/Washington-Watch/Washington-Watch/12963](http://www.medpagetoday.com/Washington-Watch/Washington-Watch/12963). For the text of the statute authorizing this research, see American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 176–178.

170. PPACA § 6301, 124 Stat. at 728.

171. See AUL Legal Staff, *Life Concerns in Senate Health Care Bill*, AMS. UNITED FOR LIFE (Dec. 16, 2009), <http://www.aul.org/2009/12/life-concerns-in-senate-health-care-reform-bill/>. Similar concerns existed in the previous bills presented in Congress. *Id.*

172. *Analysis of Senate Bill Passed 12-23-2009*, THE ROBERT POWELL CTR. FOR MED. ETHICS, <http://www.nrlc.org/HealthCareRationing/SenateBill122309.html> (last visited Apr. 20, 2011).

173. Robert Pear, *Obama to Bypass Senate to Name Health Official*, N. Y. TIMES, July 6, 2010, at A11.

174. Alan Mascarenhas, *Don Berwick Appointed to Drive Health Care Changes, Sidestepping Congress*, NEWSWEEK (July 7, 2010), <http://www.newsweek.com/blogs/the-gaggle/2010/07/07/don-berwick-appointed-to-drive-health-care-changes-sidestepping-congress.html>.

175. *Rethinking Comparative Effectiveness Research*, BIOTECHNOLOGY HEALTHCARE, June 2009, at 35, 36.

raises concern that he will direct these changes in a way that does not adequately respect all human life.

## VI. THE RESPONSE TO PPACA

In March 2010, Nancy Pelosi, the Speaker of the House, famously said about the Senate health care reform bill, "We have to pass the bill, so you can find out what is in it."<sup>176</sup> Now that the bill has passed, we see very clearly what is in the bill and what the bill is lacking.

While the state insurance exchanges are not slated to begin until 2014, the implementation of the "high-risk pools,"<sup>177</sup> covered by \$5 billion in federal subsidies under the Pre-Existing Condition Insurance Plan (PCIP), has confirmed that a comprehensive Congressional measure is necessary to ensure there will be no federal funding of abortion under PPACA, despite President Obama's Executive Order. Such plans were initially approved by the Department of Health and Human Services for three states.<sup>178</sup>

On July 13, 2010, the NRLC pointed out that while the language in the Pennsylvania plan states "elective abortions are not covered," that would not prohibit federal funds from being used for abortion.<sup>179</sup> NRLC explained:

[T]he operative language does not define "elective." Rather, the proposal specifies that the coverage "includes only abortions and contraceptives that satisfy the requirements of" several specific statutes, the most pertinent of which is 18 Pa. C.S. § 3204, which says that an abortion is

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176. alexanders8, *Pelosi: We Have to Pass the Health Care Bill so that You Can Find Out What is in It*, YOUTUBE (Mar. 9, 2010), <http://www.youtube.com/watch?v=KoE1R-xH5To>.

177. *Supra* note 125 and accompanying text.

178. See Press Release, Pa. Ins. Dep't, PA Insurance Commissioner Announces Federal Approval of High-Risk Plan (June 28, 2010), *available at* <http://tinyurl.com/icrelease>; Trip Jennings, *NM Move to Cover Abortion in High Risk Pools Prompts Feds to Ban Coverage*, THE N.M. INDEP. (July 19, 2010, 10:00 AM), <http://newmexicoindependent.com/59761/nm-move-to-cover-abortion-in-high-risk-pools-prompts-feds-to-ban-coverage> (noting that New Mexico originally planned to cover abortions in high-risk insurance pools before a ban became part of federal rules); *Taxpayer-funded Abortions in High Risk Pools*, FACTCHECK (July 22, 2010), <http://www.factcheck.org/2010/07/taxpayer-funded-abortion-in-high-risk-pools/> (discussing Pennsylvania, New Mexico and Maryland plans).

179. Press Release, Nat'l Right to Life Comm., H.H.S. Approves Pennsylvania Plan to Use Federal Funds to Subsidize Coverage of Nearly All Abortions in New "High-Risk Pool" Program (July 13, 2010), *available at* [http://www.nrlc.org/press\\_releases\\_new/Release071310.html](http://www.nrlc.org/press_releases_new/Release071310.html).

legal in Pennsylvania (consistent with *Roe v. Wade*) if a single physician believes that it is “necessary” based on “all factors (physical, emotional, psychological, familial and the woman’s age) relevant to the well-being of the woman.” Indeed, the cited statute provides only a single circumstance in which an abortion prior to 24 weeks is NOT permitted under the Pennsylvania statute: “No abortion which is sought solely because of the sex of the unborn child shall be deemed a necessary abortion.”<sup>180</sup>

Thus, only sex-selection abortions would have been excluded from federal funding under the Pennsylvania plan.

The New Mexico state plan involving a \$37 million high-risk pool explicitly *included* federal funding for elective abortions.<sup>181</sup> The Maryland state plan, with \$85 million in its federally funded high-risk insurance pool, also expressly covered abortions.<sup>182</sup>

On July 14, 2010, HHS Spokeswoman Jenny Backus announced that the high-risk pools would not be permitted to include elective abortion coverage, citing prohibitions in other federal programs, such as the Federal Employee Health Benefits Plan, as a basis for the HHS decision.<sup>183</sup> This initial statement, however, was not backed by HHS regulations prohibiting abortion funding.<sup>184</sup>

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180. *Id.*

181. After pro-life groups pointed out that the New Mexico plan listed “elective termination of pregnancy” as a covered benefit, Michelle Lujan Grisham, deputy director of the New Mexico Medical Insurance Pool, responded that the state was in “the process of correcting the package so it will not have elective abortion coverage.” Ricardo Alonso-Zaldivar, *Questions Over Abortion in New Federal Health Plan*, WASH. TIMES (July 14, 2010, 5:19 PM), <http://www.washingtontimes.com/news/2010/jul/14/questions-over-abortion-in-new-federal-health-plan/>.

182. A “Frequently Asked Questions” document noted that the Maryland PCIP plan would offer the same benefit package as other existing MHIP plan options—plans that cover elective abortion. See *MHIP Federal Plan—Q & A*, MD. HEALTH INS. PLAN, [http://marylandhealthinsuranceplan.state.md.us/mhip/attachments/FederalPreexisting\\_FAQ.pdf](http://marylandhealthinsuranceplan.state.md.us/mhip/attachments/FederalPreexisting_FAQ.pdf) (last visited Apr. 20, 2011); see also MD. HEALTH INS. PLAN, 2010 PLAN YEAR CERTIFICATE OF COVERAGE 53 (2010), <http://www.marylandhealthinsuranceplan.state.md.us/mhip/attachments/CertificateOfCoverage.pdf> (listing abortion under “covered services”).

183. Press Release, Dep’t of Health & Human Servs, Statement of HHS Spokeswoman Jenny Backus on the Pre-Existing Condition Insurance Plan Policy (July 14, 2010), available at <http://www.hhs.gov/news/press/2010pres/07/20100714d.html>.

184. Cardinal Daniel DiNardo, Secretariat of the Pro-Life Committee of the USCCB, praised HHS’s action, but underscored the continued need for permanent prohibitions against taxpayer funding of abortion. Chris Korzen of Catholics United mischaracterized the comments of Cardinal DiNardo in an attempt to argue that PPACA and the Executive Order already prohibit abor-



Pro-abortion groups who asserted that abortion coverage was not prohibited in the plans contested HHS's view. The Center for Reproductive Rights wrote:

Contrary to assertions by the White House, there's no current legal basis for the policy. The executive order issued by the President on abortion only addressed rules for segregating funds for abortion coverage in the healthcare exchanges and limits on community health centers.<sup>185</sup>

A July 23, 2010 memorandum from the Congressional Research Service (CRS)<sup>186</sup> confirmed what pro-life and pro-abortion organizations had noted.<sup>187</sup> Summarizing the CRS findings, thirteen Senators wrote in a July 28 letter to the Secretary of HHS:

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tion funding. See William Saunders, *Health Care Reform and Executive Order Did Not Prohibit Federal Funding for Abortion*, WASH. POST (July 30, 2010, 10:38 AM), [http://newsweek.washingtonpost.com/onfaith/guestvoices/2010/07/health\\_care\\_reform\\_and\\_executive\\_order\\_did\\_not\\_prohibit\\_federal\\_funding\\_for\\_abortion.html](http://newsweek.washingtonpost.com/onfaith/guestvoices/2010/07/health_care_reform_and_executive_order_did_not_prohibit_federal_funding_for_abortion.html).

185. Press Release, Ctr. for Reprod. Rights, Center Denounces Obama Administration Policy Excluding Abortion Coverage from High-Risk Pools (July 19, 2010), available at <http://reproductiverights.org/en/press-room/center-denounces-obama-administration-policy-excluding-abortion-coverage-from-high-risk-p>.

186. Memorandum from Cong. Research Services for Senate Comm. on Health, Educ., Labor, & Pensions, on High Risk Pools Under PPACA and the Coverage of Elective Abortion Services 3 (July 23, 2010), available at <http://help.senate.gov/imo/media/doc/CRS%20Report%20for%20HELP%2007232010.pdf>.

187. Pro-life groups argued from the outset that nothing in PPACA or the Executive Order explicitly prohibited federal funding for abortion. See, e.g., *Abortion Tax and Other Problems in President's Proposal (Same as the Senate Health Care Reform Bill)*, AMS. UNITED FOR LIFE (Feb. 22, 2010), <http://www.aul.org/2010/02/the-abortion-tax-and-other-problems-in-senator-reid%E2%80%99s-amendment/>; *AUL Legal Team: Why the Executive Order Does Not Prevent Taxpayer Funded Abortion*, AMS. UNITED FOR LIFE (Mar. 21, 2010), <http://www.aul.org/2010/03/aul-legal-team-why-the-executive-order-does-not-prevent-taxpayer-funded-abortion/>. See also Letter from Nat'l Right to Life Comm. to U.S. Senators (Dec. 20, 2009) (regarding the cloture vote on Senator Reid's Manager's Amendment), available at <http://www.nrlc.org/AHC/NRLCManagersAmendScoreLetter.pdf>; Press Release, Nat'l Right to Life Comm., Statement by the National Right to Life Committee on Abortion "Deal" On Health Care Legislation (Mar. 21, 2010), available at <http://www.nrlc.org/AHC/Release032110.pdf>; Letter from U.S. Conference of Catholic Bishops to U.S. Senators (Dec. 22, 2009), available at <http://www.usccb.org/healthcare/letter-to-senate-20091222.pdf> (describing Senate health care bill as "deficient"); Memorandum from U.S. Conference of Catholic Bishops, Office of Gen. Counsel, on the Legal Analysis of the Provisions of the Patient Protection and Affordable Care Act and Corresponding Executive Order Regarding Abortion Funding and Conscience Protection (Mar. 25, 2010), available at <http://www.usccb.org/ogc/Healthcare-EO-Memo.pdf>.

According to CRS, neither the restrictions in PPACA, Presidential Executive Order 13535 nor the recently released HHS contract materials actually prohibit a state high-risk pool from covering elective abortions.<sup>188</sup>

Finally, on July 29, two weeks after its initial statement, HHS issued regulations on the high-risk pools, ensuring that the funds will not be used for elective abortions.<sup>189</sup> However, this action does not close other anti-life loopholes in PPACA and the Executive Order. Nancy-Ann DeParle, director of the White House Office of Health Reform, wrote on the White House blog that

[t]he [high risk pool] program's restriction on abortion coverage is not a precedent for other programs or policies [covered by the health care reform law] given the unique, temporary nature of the program and the population it serves.<sup>190</sup>

Doug Johnson, of NRLC, noted the gravity of the White House statement:

This means that unless Congress repeals the health care law or performs major corrective surgery on it, there will be years of battles, as each new program is implemented, over how elective abortion will be covered—and the White House is suggesting that today's policy will not necessarily be applied when implementing the other programs, some of which will cover far larger populations.<sup>191</sup>

Therefore, the only way to ensure that federal funds under PPACA will not be used for abortions is to pass a federal law to that effect.<sup>192</sup>

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188. Letter from Senator Mike Enzi et al. to Kathleen Sebelius, Sec'y of Dep't of Health & Human Servs. (July 28, 2010), *available at* <http://www.scribd.com/doc/35000352/Enzi-Coburn-Letter-on-Abortion-Funding-in-High-Risk-Pools>.

189. Pre-Existing Condition Insurance Plan Program, 75 Fed Reg. 45,014, 45,031 (July 30, 2010) (to be codified at 45 C.F.R. § 152.19(b)). See *id.* at 45,018 for a discussion of the reasoning behind the regulation, citing to President Obama's Executive Order.

190. Nancy-Ann DeParle, *Insurance for Americans with Pre-Existing Conditions*, THE WHITE HOUSE BLOG (July 29, 2010, 8:40 AM), <http://www.whitehouse.gov/blog/2010/07/29/insurance-americans-with-pre-existing-conditions>.

191. Press Release, Nat'l Right to Life Comm., National Right to Life: This Shows the Law *Allows* Abortion Funding (July 29, 2010), *available at* [http://www.nrlc.org/press\\_releases\\_new/Release072910.pdf](http://www.nrlc.org/press_releases_new/Release072910.pdf).

192. AUL has filed a comment to the HHS regulation noting that, in light of long-standing federal law prohibiting the use of federal tax dollars for abortions and the authority given by the PPACA to the Secretary of HHS to prohibit federal funding for abortions through the PCIP program, the prohibition of

### A. Congressional Reaction

Two bills have been introduced in the House of Representatives that would prohibit abortion funding under PPACA. On April 22, 2010, Reps. Pitts and Lipinski introduced the "Protect Life Act" (H.R. 5111).<sup>193</sup> The bill would amend PPACA by prohibiting the use of any funds under it for abortions or abortion coverage. It would prohibit the federal government from requiring private insurance companies to cover abortion, thereby closing one loophole. H.R. 5111 would also protect health care providers from discrimination for refusal to participate in abortions. The bill currently has 121 cosponsors.

H.R. 5939, the second bill, introduced on July 29, 2010, by Rep. Chris Smith (R-N.J.) and Rep. Lipinski is more comprehensive.<sup>194</sup> The "No Taxpayer Funding for Abortion Act" would establish a permanent government-wide prohibition on federal funding for abortions and abortion coverage, eliminating the need for (a) appropriations riders (such as the Hyde Amendment which must be renewed annually), (b) regulations (which can be overturned by new administrations), and (c) executive orders (which exist at the will of the President). H.R. 5939 also codifies the Hyde-Weldon conscience clause.<sup>195</sup> The bill currently has 184 cosponsors.

### B. State Response

#### 1. Opting-Out

One option pro-life Americans have is to pass laws in their states to "opt out" of having plans that cover abortions offered in their state exchanges.<sup>196</sup> To assist state legislators in opting-out of providing health insurance plans with abortion coverage through their exchanges, pro-life organizations have created model "opt-out" legislation.<sup>197</sup> Currently, more than thirty states have either introduced an opt-out bill, are planning to introduce

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abortion funding of the regulation should remain in place. See Comment from William L. Saunders, Senior Vice President of Legal Affairs, Ams. United for Life, to Ctrs. for Medicare & Medicaid Servs. (Sept. 2010), available at <http://www.aul.org/wp-content/uploads/2010/09/AUL-Comment-on-PCIP.pdf>.

193. H.R. 5111, 111th Cong. (2010).

194. H.R. 5939, 111th Cong. (2010).

195. See *supra* note 166 and accompanying text.

196. PPACA, Pub. L. No. 111-148, § 1323(a), 124 Stat. 119, 192 (2010).

197. See, e.g., *States Opt Out*, AMS. UNITED FOR LIFE, <http://www.aul.org/initiative/opt-out/> (last visited Apr. 23, 2011). See also *Your State Can Enact "Obamacare Abortion-Insurance Opt-Out" Law*, BIOETHICS DEFENSE FUND (Aug. 21, 2010), <http://bdfund.wordpress.com/2010/08/21/your-state-can-enact-obamacare-abortion-insurance-opt-out-law/>.

a bill shortly, or are laying the groundwork to introduce a bill as soon as their legislative calendars permit. Those that have passed such legislation into law include Arizona,<sup>198</sup> Louisiana,<sup>199</sup> Mississippi,<sup>200</sup> Missouri,<sup>201</sup> and Tennessee.<sup>202</sup>

Opt-out legislation passed the legislature in both Florida and Oklahoma. However, in Florida the legislation was vetoed by Governor Charlie Crist (R).<sup>203</sup> The Oklahoma opt-out legislation was vetoed by Governor Brad Henry (D) without enough time left in the legislative session to override the veto.<sup>204</sup>

## 2. Additional Limitations on Abortion Funding

Five states have laws, dating back as far as 1978, that prohibit private insurance plans operating within their states from covering elective abortions.<sup>205</sup> One positive outcome from the health care reform debate is that many more Americans are now aware that a large number of private insurance plans, even perhaps their own, cover elective abortions.<sup>206</sup> As a result, more states are seeking to go further than preventing insurance plans that cover abortions from participating in their state exchanges, to prohibiting all private insurance plans operating within their states from covering elective abortions.<sup>207</sup>

State legislators are also seeking to prohibit abortion coverage for state employees. Thirteen states currently prohibit the

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198. S. 1305, 49th Leg., 2nd Reg. Sess. (Ariz. 2010).

199. H.R. 1247, 2010 Reg. Sess. (La. 2010) (enacted).

200. S. 3214, 2010 Reg. Sess. (Miss. 2010) (enacted).

201. S. 793, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010).

202. H.R. 2681, 106th Gen. Assem., 1st Reg. Sess. (Tenn. 2010) (enacted 2010).

203. John Frank & Lee Logan, *Gov. Charlie Crist Vetoes Abortion Bill*, ST. PETERSBURG TIMES, June 12, 2010, at 1A.

204. While there was an attempt to override Governor Henry's veto, the state senate failed to do so. See Steven Ertelt, *Oklahoma Won't Override Veto of Bill Stopping Abortion Funding in Health Care*, LIFE NEWS (May 28, 2010), <http://www.lifenews.com/2010/05/28/state-5138/>.

205. IDAHO CODE ANN. §§ 41-2142, 2210A, 3439, 3924 (2010); KY. REV. STAT. ANN. § 304.5-160 (West 2009); MO. ANN. STAT. § 376.805 (West 2002); N.D. CENT. CODE § 14-02.3-03 (2009); OKLA. STAT. ANN. tit. 63, § 1-741.2 (West Supp. 2011).

206. According to the Guttmacher Institute, "87% of typical employer-based insurance policies in 2002 covered *medically necessary* or *appropriate* abortions." *Guttmacher Institute Memo on Insurance Coverage of Abortion*, GUTTMACHER INST. (July 22, 2009, as amended on Sept. 18, 2009), <http://www.guttmacher.org/media/inthenews/2009/07/22/index>.

207. See *States Opt Out*, *supra* note 197.

use of state funds for abortion coverage (with no or limited exceptions) for state employees.<sup>208</sup>

## VII. CONCLUSION

In March 2010, President Obama signed the PPACA and an Executive Order. While the Nation still waits for HHS to issue regulations in accordance with the order,<sup>209</sup> an honest evaluation of the legislation shows that the promise of candidate Obama (that abortion would be at the heart of his health care plan) and not the promise of President Obama (that no federal funds would be used for abortion) came to fruition.

What may have been most significant for pro-life prospects in the long term was the failure of pro-life Democrats in the House and in the Senate to put their pro-life convictions ahead of party loyalty and the desire for health care reform. How this will play out in subsequent years (and elections) cannot, of course, be known with certainty. But it badly strained—if it did not sever—inter-party pro-life cooperation with Republican pro-lifers. If that becomes permanent, or if it signals the end of a true pro-life element within the Democratic Party, the cost of health care reform may have been high indeed.

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208. S. 1305, 49th Leg., 2nd Reg. Sess. (Ariz. 2010); Colo. Att’y Gen. Op. No. 85-02 AG Alpha No. AD AC AGANY /ANY (Feb. 6, 1985), *available at* [https://www.coloradoattorneygeneral.gov/ag\\_opinions/1985/no\\_85\\_02\\_ag\\_alpha\\_no\\_ad\\_ac\\_agany\\_february\\_6\\_1985](https://www.coloradoattorneygeneral.gov/ag_opinions/1985/no_85_02_ag_alpha_no_ad_ac_agany_february_6_1985); COLO. CONST. art. V, § 50; 5 ILL. COMP. STAT. ANN. 375/6, 6.1 (West 2005); KY. REV. STAT. ANN. § 18A.225(10) (2010 & Supp. 2010); 1996 MASS. ACTS 1418–19; MISS. CODE ANN. § 41-41-91 (2007); NEB. REV. STAT. § 44-1615.01 (2004); N.D. CENT. CODE § 14-02.3-03 (2009); OHIO REV. CODE ANN. § 124.85 (LexisNexis 2007); 18 PA. CONS. STAT. ANN. §§ 3215(c), (d) (West 2000); R.I. GEN. LAWS ANN. § 36-12-2.1 (1997); H.R. 4800, 117th Gen. Assem., 2nd Reg. Sess. (S.C. 2008); Va. Dep’t of Human Resource Mgmt., Mem. No. 96-9 (May 31, 1996). AUL offers model legislation “The Employee Coverage Prohibition Act,” which is also modeled after existing state laws on the topic. *See States Opt Out*, *supra* note 197.

209. “Pre-regulatory model guidelines” were published on September 20, 2010. OFFICE OF MGMT. & BUDGET & DEP’T OF HEALTH & HUMAN SERVS., PRE-REGULATORY MODEL GUIDELINES UNDER SECTION 1303 OF THE AFFORDABLE CARE ACT (2010), [http://www.whitehouse.gov/sites/default/files/omb/assets/financial\\_pdf/segregation\\_2010-09-20.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/financial_pdf/segregation_2010-09-20.pdf). They do not address the CHC funding and only proffer to ensure compliance with the deficient segregation requirement of the PPACA for subsidies used in the insurance exchanges. *Id.*